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No. 08-

# In the Supreme Court of the United States

JEFFREY BEARD,
*Petitioner*

*v.*

FRANCIS HANNON,
*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a state official be sued in another State, consistent with principles of due process and state sovereignty, for a single decision made in the official's home State and pursuant to the official's duties?

## PARTIES TO THE PROCEEDING

Petitioner is Jeffrey Beard, Secretary of the Pennsylvania Department of Corrections. Respondent is Francis Hannon, a Pennsylvania prisoner who was transferred out of state pursuant to the Interstate Corrections Compact.[1]

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[1] Maryjane Hesse, who is represented by counsel for the Petitioner, was a party in the proceedings in the Court of Appeals but has no interest in the outcome of this petition.

The following parties were listed on the docket in the Court of Appeals but did not participate in the proceedings in that court: Raymond Cook, Sean Milliken, Wayne D. Crosby, Lawrence M. McArthur, Kevin King, Henry LaPlante, William White, Christopher DeMarco, Angel Pimintal, Joseph Lodico, Steven Balsavich, Edward Keith, Michael T. Maloney, Peter Allen, Kristie LaDouceur, Kenneth Deorsey, Paul Duford, Jeffrey Grimes, Richard Medeiros, Gilbert Lemon, II, John Does 1-50, Clark Color Lab, Vincent Mooney, Massachusetts Department of Corrections, Frederick Callendar, Richard McArthur, James Sullivan, Gary Fyfe, Robert Kolber, and Herbert Berger-Hershkowitz. Petitioner believes that they have no interest in the outcome of this petition and is serving and filing the notice required by Sup. Ct. R. 12.6.

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## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 524 F.3d 275 (1st Cir. 2008) and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The decision of the district court is not reported but is available electronically at 2007 WL 1858672 (D. Mass. June 26, 2007) and is reprinted at Pet. App. 22a.

## STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on April 28, 2008. Petitioner filed a timely petition for rehearing, which was denied on June 6, 2008. Pet. App. 39a-40a. This petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, "nor shall any person ... be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. AMEND. V. Similarly, the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. AMEND. XIV, § 1.

## STATEMENT OF THE CASE

In this case, Petitioner asks the Court to decide whether it is constitutionally permissible for a court to exercise personal jurisdiction over a state official who has been sued in a foreign State – here, for a single decision, made in the official's home State, pursuant to his official duties – without giving special consideration to the sovereignty interests of the official's State and the governmental character of the official's acts. Specifically, this case arises out of the transfer of a state prisoner from Pennsylvania to Massachusetts pursuant to the Interstate Corrections Compact (ICC).[2] The Court of Appeals held that a Massachusetts court could exercise personal jurisdiction over a Pennsylvania official in order to decide whether that official transferred the prisoner for an improper reason. In so holding, the Court of Appeals discounted the inherent differences between governmental and non-governmental activities, dismissed the importance of holding state officials accountable in their own States for alleged abuses of their state-conferred authority, and failed to take into

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[2] Pennsylvania's version of the ICC is at Pa. Stat. Ann., tit. 61, §§ 1061-1063; Massachusetts' version is at Mass. Gen. Laws ch. 125 App., § 2-1. Thirty-eight other States and the District of Columbia are parties to the ICC. *See* NATIONAL CENTER FOR INTERSTATE COMPACTS, *Interstate Compact Database* (available at http://www.csg.org/programs/ncic/database/search.aspx) (visited Aug. 28, 2008). There are also similar regional compacts: the New England Corrections Compact (to which all six New England States belong) and the Western Corrections Compact (which eleven Western States have joined). *Id.*

account the practical effects of its decision on prison administration and elsewhere.

While the underlying dispute here is between one inmate and one prison official, the decision of the Court of Appeals has broad implications for state officials throughout the country. Not only does the decision allow prison officials who invoke the ICC to be sued by transferred inmates practically anywhere; logically, it also clears the way for state government defendants to be sued outside the States they serve on other types of claims. For example, under the reasoning of the Court of Appeals, officials charged with enforcing state statutes may be sued by out-of-state targets in the targets' home states. This result cannot be reconciled with the Court's personal jurisdiction precedents or with decisions of other courts of appeals in cases against state defendants.

1. Petitioner is the Secretary of Pennsylvania's Department of Corrections (DOC). Pet. App. 32a. From this cabinet-level position,[3] he supervises over 14,000 employees and oversees the operation of more than two dozen state correctional institutions and other facilities housing over 45,000 prisoners.[4] Respondent, one of those prisoners, was convicted of first degree murder in 1978; was sentenced to life imprisonment; and has served time in a number of Pennsylvania and out-of-state institutions. *See* Pet.

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[3] *See* Pa. Stat. Ann., tit. 71, §§ 66, 67.1(d)(1), 310-1.

[4] *See* PA. OFFICE OF ADMINISTRATION, *2008 Governor's Annual Work Force Report* 5 (Table 4) (available at http://www.workforcereport.state.pa.us) (visited Aug. 20, 2008); PA. DEPT. OF CORRECTIONS, *Monthly Population Report* 1 (July 2008), *available at* http://www.cor.state.pa.us/portal/lib/portal/monthly_population.pdf (visited Aug. 20, 2008).

App. 3a-4a. In December of 2001, he was transferred to Massachusetts and remained there until January of 2007, when he was transferred to New Jersey.[5] Pet. App. 5a.

Respondent has been an active jailhouse lawyer, advocating for himself and other inmates. Pet. App. 3a. Citing this activity, he has challenged his intrastate and interstate transfers as retaliatory, but to date has not prevailed on these claims. *See, e.g.*, *Hannon v. Terra*, No. 94-2845, 1995 WL 129219, at *11-12 (E.D. Pa. Dec. 19, 1986).

2. Respondent filed this action, pursuant to 42 U.S.C. § 1983, in October of 2003, against Secretary Beard and Pennsylvania institutional librarian Maryjane Hesse.[6] Over a year later, the District Court appointed counsel to represent Respondent, and counsel filed an amended complaint. Respondent alleged that Petitioner transferred him to Massachusetts in retaliation for his jailhouse lawyering and that after that transfer Ms. Hesse unjustifiably denied his requests for Pennsylvania and District of Columbia legal materials. He sought damages and an injunction against "further violations" of his constitutional rights.

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[5] Under Article IV(c) of the ICC, Respondent's status as a Pennsylvania prisoner did not change, even when his location did. *See* Pa. Stat. Ann., tit. 61, § 1062; Mass. Gen. Laws ch. 125 App., § 2-1.

[6] The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343. Respondent was joined in his action by a group of Massachusetts inmates, and together they asserted claims against a group of Massachusetts prison officials and certain private parties. None of those other plaintiffs, defendants or claims is involved in this petition.

The two Pennsylvania defendants moved to dismiss on several grounds, including lack of personal jurisdiction, and their motion was granted. Pet. App. 32a-36a.[7] The District Court concluded that Petitioner's "mere transfer" of Respondent pursuant to the ICC did not "constitute[] the transaction of business in Massachusetts" for purposes of the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3(a), Pet. App. 35a, and on that basis dismissed Respondent's claims against both Pennsylvania defendants for lack of personal jurisdiction. Pet. App. 35a-36a. The court certified this decision as a final judgment pursuant to Fed.R.Civ.P. 54(b) and Respondent appealed.

3. The Court of Appeals affirmed the jurisdictional dismissal of Respondent's claims against Ms. Hesse, the Pennsylvania librarian, but it reversed the dismissal of his claims against Petitioner. Pet. App. 21a.

The Court of Appeals began by acknowledging that Massachusetts had no basis for asserting general jurisdiction over Beard or Hesse – there was no allegation that they had engaged in the kind of "continuous and systematic activity" that would support such jurisdiction – and thus turned immediately to the question of "specific" jurisdiction, that is, whether there is "a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities." Pet. App. 7a. The Court of Appeals

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[7] While the motion to dismiss was pending, Respondent learned that he was to be transferred again. He attempted to have his transfer enjoined but was unsuccessful. *See Hannon v. Maloney*, 242 Fed. Appx. 712 (1st Cir. 2007) (affirming denial of injunction).

took it as given that Petitioner had "arranged" Respondent's transfer, Pet. App. 9a, 10a, and this, the court assumed, "necessarily involved at least some communication and interaction between Beard in Pennsylvania and his counterparts in Massachusetts." Pet. App. 10a.[8] The Court of Appeals held that "[t]he contacts that Beard would have had to make to arrange for Hannon's transfer from Pennsylvania to Massachusetts are sufficient to constitute 'transacting business' under the broadly construed [Massachusetts] long arm statute." *Ibid.*[9] The fact that Petitioner's actions were governmental rather than "commercial," was simply "not relevant" to consideration of the "transacting business" requirement. *Ibid.* Beyond that, the court said, there was no basis for treating Petitioner's status as a state official as a bar to his being subject to personal jurisdiction in a foreign State. Pet. App. 11a.

Turning to the "due process" prong of the personal jurisdiction analysis, the Court of Appeals said that "it seem[ed] clear that Hannon's claims against Beard arise from Beard's voluntary contacts with Massachusetts." Pet. App. 13a. The court deemed those contacts "related" to Respondent's retaliation

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[8] Even assuming that Respondent was transferred to Massachusetts with Petitioner's knowledge, the assumption that Petitioner actually arranged the transfer (and thus had contact with Massachusetts himself) is unfounded. Documents that Respondent placed in the record show that it was a DOC employee who forwarded an ICC "referral" to her counterpart in Massachusetts, who then processed it.

[9] In contrast, the court found that Ms. Hesse, the librarian, did not "transact business" in Massachusetts, even though she personally received and responded to a number of letters from Respondent when he was incarcerated in Massachusetts. Pet. App. 11a-12a.

claim because the claim was "based on the transfer itself" and Respondent's "alleged constitutional injury would not have occurred 'but for' Beard's arrangement for his transfer." *Ibid.*

The Court of Appeals acknowledged concerns that its holding would subject prison officials across the country to lawsuits in every State that is a party to the ICC, but thought that its decision "ought not have this affect [sic]." Pet. App. 15a. The Court of Appeals distinguished decisions from other courts that had declined to exercise jurisdiction over out-of-state prison officials, on the ground that all those cases involved "pre-transfer grievances," as opposed to challenges to the transfers themselves, and therefore "would not survive the relatedness inquiry". Pet. App. 15a-16a.[10]

Next, the Court of Appeals considered whether Petitioner's contacts with Massachusetts represented "a purposeful availment of the privilege of conducting activities in the forum state." Pet. App. 16a. Conceding that this was "a close question," the court concluded that "[a]rguably, Beard benefitted from subjecting Hannon to Massachusetts prisons and Massachusetts law by ridding himself of a troublemaker." Pet. App. 17a. Having already conceded that no court in a receiving State had previously entertained such a challenge, the Court of Appeals nevertheless thought that litigation over Respondent's ICC transfer was foreseeable. Pet. App. 17a-18a.

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[10] One of the cases Petitioner had cited in fact did include a challenge to the prisoner's transfer. *See Bedell v. Angelone*, No. 2:01CV780, 2003 WL 24054709, at * 16 (E.D. Va. Oct. 3, 2003), *aff'd*, 87 Fed. Appx. 323 (4th Cir. 2004) (per curiam).

Finally, the Court of Appeals confronted the issue of whether asserting personal jurisdiction over Petitioner would be constitutionally "reasonable." Pet. App. 18a. This, in turn, required the court to consider five factors, and the court found that all weighed heavily or at least slightly in Respondent's favor. Pet. App. 18a-20a.

First, relying on a complicated high-stakes private breach-of-contract case where it had held "that travel between New York and Puerto Rico was not an unusual burden for a defendant," the Court of Appeals saw "no reason why appearing in Massachusetts would be a special burden beyond ordinary inconvenience" for Petitioner. Pet. App. 19a. The court did not discuss the cumulative burden that would be placed on Pennsylvania and other States if this method of challenging transfers became popular. Nor did it note that dealing with this burden would entail spending public rather than private funds, diverting them from other uses. Nor did it discuss the impact of lessening the usefulness of the ICC, if because of this burden prison administrators became less inclined to utilize it.

As for the second "reasonableness" factor, the forum's interest, the court said that Massachusetts "may" have "some" interest in adjudicating this dispute, because it "may" not want prisoners who have been subjected to retaliation sent to its prisons. Pet. App. 19a. The court did not address any countervailing interest Massachusetts may have in not having to defend *its* officials in other States in other cases, should they be sued on similar claims, nor did it discuss Massachusetts' interest in not encouraging prisoners to bring burdensome litigation.

Third, considering Respondent's interest, the Court of Appeals stressed that Respondent had been

granted court-appointed counsel in Massachusetts. Pet. App. 19a-20a. This meant he retained "some" interest in litigating his claims against Petitioner in Massachusetts (where the rest of this action would be litigated) – even though he was no longer in Massachusetts himself. *Ibid.* Fourth, reiterating its awareness that Respondent has Massachusetts counsel, and adding that changing venue "may entail substantial judicial resources," the court found that "it may be most effective [for the judicial system] to keep the action in Massachusetts." Pet. App. 20a. That the relevant evidence and witnesses are probably in Pennsylvania was not mentioned. Finally, the Court of Appeals said, "the interests of all sovereigns in promoting substantive social policies may weigh slightly in Hannon's favor[,]" even though "this factor does not weigh particularly in Hannon's favor because the same interest [in scrutinizing possibly retaliatory ICC transfers] would be served in a Pennsylvania district court." *Ibid.*

4. Petitioner filed a timely request for panel rehearing or rehearing en banc, but his petition was denied. Pet. App. 39a-40a.

## REASONS FOR GRANTING THE WRIT

Whether a district court in one State can exercise personal jurisdiction over a state official from another State, consistent with principles of state sovereignty and due process, is an important and unresolved issue. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180-181 (1979) (noting but not resolving the issue). This case presents another iteration of the problem. The decision of the Court of Appeals

warrants review on certiorari because it conflicts with other relevant decisions of this Court and with the decisions of other courts of appeals in cases involving litigation against out-of-state officials.

## I. This Case Presents An Important And Recurring Issue Which The Court Has Not, But Should, Resolve.

Even within the limited area of prison administration, the Court of Appeals' decision has the potential to create much mischief. At any given time, many thousands of prisoners, from virtually every State, are serving their sentences in out-of-state prisons; and most of these transfers occur for reasons, such as alleviating overcrowding or relieving a security threat, that have nothing to do with the wishes of the prisoners involved.[11] Lawsuits by disgruntled prisoners that attempt to challenge such transfers on their merits are apt quickly to be dismissed, *see Olim v. Wakinekona*, 461 U.S. 238 (1983) (interstate prison transfer does not implicate liberty interest), but actions claiming that a transfer was retaliatory for some protected activity are a very different matter.

As the Court has recognized, claims of this kind, which turn on the defendant's motive, are often difficult to resolve short of a trial. "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper

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[11] *See* U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, *Interstate Transfer of Prison Inmates in the United States* at 2 (February 2006), available at http://nicic.org/download/pdf/library/021242.pdf (visited Aug. 28, 2008).

intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El v. Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks omitted). Defending against such claims thus imposes substantial burdens on state defendants under the best of circumstances. The Court of Appeals' decision greatly adds to those burdens, by requiring prison officials to transport themselves, witnesses and other evidence potentially vast distances in order to defend against these claims. *See, e.g., Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006) (involving Virginia-to-New Mexico transfer).

Prisoners in recent years have increasingly resorted to retaliation theories as a means of attacking prison decisions that they cannot attack directly,[12] and the Court of Appeals' decision in this case will encourage more such lawsuits challenging interstate transfers. The predictable result will be that prison officials will become less willing to utilize the ICC and similar tools to manage security and overcrowding problems, with ripple effects throughout the system as those officials must find other ways to deal with these concerns.

Nor is there any reason to suppose that the impact of the Court of Appeals' decision will in fact be confined to the prison context. Under that decision's logic, any state official who enforces a state statute against an out-of-state target could be sued in the target's home state, as two petitions now before the Court illustrate. *See Stroman Realty, Inc. v.*

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[12] A WestLaw search reveals that in the first six months of 2008, the courts of appeals alone issued nearly a hundred decisions in prisoner cases involving claims of retaliation.

*Wercinski*, 513 F.3d 476 (5th Cir. 2008), *petition for cert. filed*, No. 07-1387 (May 5, 2008); *Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008), *petition for cert. filed*, No. 08-109 (Aug. 12, 2008).

The Court should therefore resolve this issue because it is not only important and recurrent but also because, as discussed in Points II and III, the Court of Appeals' decision is inconsistent with the decisions of this Court and those of other courts of appeals.

## II. The Decision Of The Court Of Appeals Is Contrary To Decisions Of This Court.

In the personal jurisdiction due process calculus, the "primary concern" is the burden on the defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This concern for the defendant is heightened when that defendant is a state official, sued in another State.

In this case, the Court of Appeals recited standard personal jurisdiction principles, but in applying those principles failed to take into account Petitioner's status as a state official. This was a departure from the Court's major personal jurisdiction decisions, none of which was mentioned by the Court of Appeals. Those decisions lead unavoidably to the conclusion that in analyzing personal jurisdiction, a court may neither overlook States' general sovereignty concerns nor disregard the governmental nature of a particular state defendant's actions.

### A. Concern for States' sovereign interests is a recurring theme in the Court's personal jurisdiction jurisprudence.

Personal jurisdiction jurisprudence rests on a foundation of state sovereignty. Well over a century ago, the Court held in *Pennoyer v. Neff*, 95 U.S. 714 (1878), that, absent consent, a court cannot assert jurisdiction over someone beyond its borders, because the extra-territorial assertion of jurisdiction over a person or property "would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated...." *Id.* at 723.

While later cases moved away from a strictly territorial analysis of personal jurisdiction, the Court has continued to recognize that personal jurisdiction issues must still be assessed "in the context of our federal system of government." *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). The Court, even while acknowledging a "trend of expanding personal jurisdiction over non-residents," *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958), has continued to emphasize that the limits on personal jurisdiction are rooted in considerations of state sovereignty. "They are a consequence of territorial limitations on the power of the respective States." *Id.* at 251.

These sovereignty principles were expressed even more emphatically in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court explained that the due process concept of "minimum contacts" not only "protects the defendant against the burdens of litigating in a distant or inconvenient forum" but also "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal

system." *Id.* at 292. The Due Process Clause serves as "an instrument of interstate federalism" and may sometimes act to divest a court of the power to render a valid judgment. *Id.* at 294. Considerations of sovereignty and federalism are thus integral to the analysis of constitutional reasonableness under *World-Wide Volkswagen*.

The Court of Appeals, however, failed to take these considerations into account. The Court of Appeals perceived no special burden on Petitioner as a defendant, much as it might perceive no special burden on a businessman who had to travel from Harrisburg to Boston when sued. Pet. App. 19a. But the burdens on a state official sued in a foreign State are not the same as those faced by a private individual or entity. *See* Tracy O. Appleton, *The Line Between Liberty and Union: Exercising Personal Jurisdiction Over Officials From Other States*, 107 COLUM. L. REV. 1944, 1986-1990 (2007) (discussing interests, including sovereign interests, potentially at stake in suits against foreign state officials). The Court of Appeals paid no heed to the cumulative burdens of this kind of litigation, or to the fact that those burdens fall not so much on Petitioner personally as upon the prison system as a whole, diverting resources from other uses; and it took no account of the impact of undermining the usefulness of the ICC and similar interstate agreements.

The Court of Appeals also failed to recognize that the relative interests of the forum State and the defendant's State are different in a case like this than in a case involving purely private interests. The Court of Appeals theorized that Massachusetts "may" have an interest in adjudicating this case. Pet. App. 19a. But it did not recognize that (a) Pennsylvania, to whom the Petitioner is accountable for his conduct,

has a special interest in seeing that a claim about the propriety of that conduct is resolved in Pennsylvania; (b) Massachusetts likewise has an interest that claims against *its* officials be resolved in their home State; and (c) virtually all of the evidence and witnesses relevant to Respondent's improper transfer claim are likely to be in Pennsylvania

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To do their jobs, state officials must be allowed to exercise reasonable discretion without fear of being sued, *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), especially not in a distant State. Requiring a state official to defend against a claim in a foreign jurisdiction is a double imposition on the official's exercise of discretion. A prisoner is, of course, entitled to bring suit against a state official for violation of constitutional rights, but the prisoner should not be entitled to do so in a jurisdiction where the official does not have, and never had, any physical presence.

### B. Giving due consideration to the "quality and nature" of a defendant's activity, particularly non-commercial activity, is essential under *Kulko*.

In addition to incorporating principles of federalism and state sovereignty, due process requires a court to consider the "quality and nature" of the defendant's activity in deciding whether to exercise personal jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). In *Kulko*, the Court held that the California courts could not assert personal jurisdiction over a divorced father in New York, merely because the father had sent his child to join her mother in

California. A critical factor in the Court's reasoning was that the "cause of action here asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations." *Id.* at 97. *See also id.* at 101 (sending child to join mother California "is not a commercial act"). That, in turn, shed important light on the "quality and nature" of the father's activities. All told, "basic considerations of fairness" pointed decisively to New York as the proper forum for adjudicating the parties' dispute. *Id.* at 97.

Like the actions of Mr. Kulko, the "quality and nature" of the actions of a state official are not "commercial," nor are they undertaken for private gain of any sort, and the Court of Appeals erred in ignoring this reality. If the act of sending a child across state lines is not enough to support personal jurisdiction in the receiving State, it is difficult to see – and the Court of Appeals did not explain – why the act of sending a prisoner across state lines should be any different.

## III. The Court Of Appeals' Decision Cannot Be Reconciled With The Decisions Of The Other Circuits That Have Addressed This Issue.

Hinging, as they do, on "reasonableness," personal jurisdiction determinations are unavoidably fact-specific. *See Burger King Corp. v. Rudzewicz*,, 471 U.S. 462, 485-486 & n. 29 (1985); *Kulko*, 436 U.S. at 92. Consequently, canvassing appellate decisions involving jurisdiction over claims against out-of-state officials does not reveal a circuit split in the conventional sense. What it does reveal, though, is a pronounced trend *against* finding that state officials are amenable to suit in foreign States. With varying

degrees of emphasis on sovereignty considerations and defendants' governmental roles, most courts of appeals have declined to ratify the assertion of personal jurisdiction over state officials who have been sued outside their home States. There are two counter-examples, but in both the courts *did* take sovereignty into account; personal jurisdiction was held proper in those two situations due to the extraordinary facts presented, not because the officials were indistinguishable from private parties.

Very recently, the Seventh Circuit affirmed the dismissal of an inmate's ICC transfer-related claims for lack of personal jurisdiction. *Kinslow v. Pullara*, --- F.3d---, No. 07-2956, 2008 WL 3519882 (7th Cir. Aug. 14, 2008). *Kinslow* contrasts with the decision of the Court of Appeals in this case in at least two ways. First, the Seventh Circuit did not view the compact between the *States* of New Mexico and Illinois as an adequate predicate for finding that the named New Mexico *defendants* had the requisite contacts with Illinois for jurisdictional purposes. *Id.*, at *4-5. *Cf.* Pet. App. 9a-10a. Second, the Seventh Circuit refused to assume that any of the defendants had "sufficient personal contacts" to support personal jurisdiction – even in the case of the defendant (McReynolds) who had actually made the transfer arrangements with officials in the receiving State. *Id.* at *1, 6. *Cf.* Pet. App. 10a (upholding personal jurisdiction over Petitioner because there must have been "at least some communication between [Petitioner] and his counterparts in Massachusetts").

Similarly, in *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), the Tenth Circuit refused to allow a New Mexico prisoner who had been transferred to Virginia to sue Virginia prison officials in New Mexico. As in *Kinslow*, the court differentiated

between implementing an ICC transfer order and actually having sufficient contacts with a foreign state to justify the assertion of jurisdiction. *See Trujillo*, at 1218-1221. Moreover, the prospect of the prisoner having to proceed in two different forums did not trouble the Tenth Circuit: "[T]he New Mexico defendants will be held accountable for their conduct in New Mexico, and the Virginia defendants will be held accountable for their conduct in Virginia." *Id.* at 1222. *Cf.* Pet. App. 18a, 20a.

Outcomes in the Fifth Circuit are the same. In *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), *petition for cert. filed*, No. 07-1387 (May 5, 2008), the court held that a Texas company could not bring a civil rights claim in a Texas district court, against an Arizona official who had taken steps to enforce Arizona law against the company.[13]

Unlike the First Circuit, the Fifth Circuit in *Stroman* was fully cognizant of the defendant's governmental status and the sovereignty and federalism concerns that arise when state officials are sued in foreign jurisdictions. Though conceding that the defendant official had "reached out" to assert her authority over the Texas company, the court held that she had not "'purposefully availed' herself of the benefits of Texas law like someone actually 'doing business' in Texas." *Stroman*, 513 F.3d at 484.[14] The

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[13] The Fifth Circuit rendered a similar ruling in *Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386-387 (5th Cir. 2008), *petition for cert. filed*, No. 08-189 (Aug. 12, 2008), which involved claims by the same Texas company against state officials from Florida and California.

[14] The court had already expressed doubt that the activities of a state official would amount to "doing business" under the applicable long-arm statute. *Stroman*, 513 F.3d at 484.

Fifth Circuit also understood that the defendant was not engaged in commercial transactions and did not seek (or obtain) any commercial benefit; she was, instead, "acting in a governmental capacity." *Id.* at 485 (citing *Kulko*). *Cf.* Pet . App. 10a-11a. And the court was sensitive to the untoward implications of upholding jurisdiction: doing so could subject the defendant "and, for that matter, any state official" to suit in multiple foreign states. *Id.* at 486. *Cf.* Pet. App. 15a.

The Fourth Circuit held likewise in *City of Virginia Beach, Virginia v. Roanoke River Basin Ass'n*, 776 F.2d 484 (4th Cir. 1985), a water resources case. There, even though the Governor of North Carolina had had discussions and attended meetings in Virginia, the court concluded that applicable long-arm requirements (which extend to the limits of due process) were not met. *Id.* at 487-488. The concurring judge observed, "While the governor's contacts may ... amount to 'business' in the expansive colloquial sense of the word, the Virginia [long-arm] statute is primarily concerned with private business, and not with the conduct of state affairs by the principal executive officer of a sovereign." *Id.* at 489.

In the Sixth Circuit, the D.C. Circuit, and the Federal Circuit as well, personal jurisdiction over state officials from foreign States has been found wanting. *See Mich. Coalition of Radioactive Material Users v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992) (Michigan organization could not bring suit in Michigan against officials of three other States to force them to grant access to radioactive waste disposal sites); *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995) (official of New Mexico Supreme Court could not be sued in D.C. to enjoin disciplinary action against attorney licensed in New Mexico but

employed in D.C.);[15] *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334 (Fed. Cir. 2006) (no personal jurisdiction over Arkansas state university officials sued in Missouri for patent infringement).

The only circuits to have found the exercise of personal jurisdiction over foreign state officials proper are the Ninth and the Second, and both cases involved officials who had allegedly violated the law while physically present in the forum State. In *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), a plaintiff sued New York officials in California, asserting that he had been wrongfully arrested in California, extradited, and incarcerated in New York. The Ninth Circuit held that personal jurisdiction could not be asserted over those New York defendants "whose interaction with [the arrestee] took place solely in New York," *id.* at 692, upholding jurisdiction only over those New York officers "who were directly involved in the extradition ... and in fact traveled to California to pick [the arrestee] up and take him to New York." *Ibid.* [16]

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[15] *See also Hannon v. Beard*, No. 03-7145, 2005 WL 18052 (D.C. Cir. Jan. 4, 2005), *aff'g* No. 02-1779 (D.D.C. Sept. 26, 2003) (in another action brought by Respondent, allegations against non-resident state prison officials insufficient to confer jurisdiction under D.C. long-arm statute).

[16] The Ninth Circuit explicitly requires consideration of "the extent of conflict with the sovereignty of the defendant's state." *Ziegler v. Indian River County*, 64 F.3d 470, 475 (9th Cir. 1995). District courts in the Ninth circuit have relied upon that factor in finding no personal jurisdiction over non-forum state officials. *See PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp.2d 1179, 1190 (C.D. Cal. 2000). *See also Dial Up Services, Inc. v. State of Oregon*, No. 07-00423, 2007 WL 4200756, at *5 (D. Ariz. Nov. 27, 2007).

Finally, the Second Circuit upheld personal jurisdiction in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), *cert. denied*, 127 S.Ct. 379 (2006). The plaintiffs there alleged that the Master Settlement Agreement (MSA), which resolved nationwide tobacco litigation brought by state attorneys general, violated the Sherman Antitrust Act. The Second Circuit held that the attorneys general could be sued in New York because the alleged antitrust violation – the negotiation and execution of the MSA – had occurred in New York. Even in so holding, the court recognized that it was dealing with an exceptional situation, noting "that New York would not ordinarily be the proper forum to challenge another state's legislative and executive actions." *Id.* at 167.

Even assuming that personal jurisdiction in these last two cases was properly asserted, they are a far cry from the circumstances of this case, where no physical presence in the forum State is even alleged. There can be little doubt that, if this case had been brought in any of the above circuits – including the Second or Ninth – the outcome would have been different. The Court of Appeals' decision in this case cannot be reconciled either with the decisions of the other circuits, or with the principles that underlie the decisions of this Court. The Court should review this decision to resolve the matter.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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**United States Court of Appeals**
**For the First Circuit**

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No. 07-2272

FRANCIS HANNON,
Plaintiff, Appellant,

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RAYMOND COOK; SEAN MILLIKEN; WAYNE D. CROSBY; LAWRENCE M. MCARTHUR; KEVIN KING; HENRY LAPLANTE; WILLIAM WHITE; CHRISTOPHER DEMARCO; ANGEL PIMENTAL; JOSEPH LODICO; STEVEN BALSAVICH; and EDWARD KEITH,
Plaintiffs,

v.

JEFFREY BEARD and MARYJANE HESSE,
Defendants, Appellees,

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MICHAEL T. MALONEY; PETER ALLEN; KRISTIE LADOUCEUR; KENNETH DEORSEY; PAUL DUFORD; JEFFREY GRIMES; RICHARD MEDEIROS; GILBERT LEMON, II; JOHN DOES 1-50; CLARK COLOR LAB; VINCENT MOONEY; MASSACHUSETTS DEPARTMENT OF CORRECTIONS; FREDERICK CALLENDAR; RICHARD MCARTHUR; JAMES SULLIVAN; GARY FYFE; ROBERT KOLBER; and HERBERT BERGER-HERSHKOWITZ,
Defendants

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

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Before

Torruella, Circuit Judge,
Wallace,* Senior Circuit Judge,
and Lipez, Circuit Judge

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Matthew J. Matule, with whom David S. Clancy and Christopher G. Clark was on brief for appellant Hannon.

Claudia M. Tesoro, Senior Deputy Attorney General, with whom Thomas W. Corbett, Jr., Attorney General, Calvin R. Koons, Senior Deputy Attorney General, and John G. Knorr, III, Chief Deputy Attorney General, Chief, Appellate Litigation Section, was on brief for appellees Beard and Hesse.

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April 28, 2008

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WALLACE, Senior Circuit Judge. Francis Hannon appeals from the district court's final order

* Of the Ninth Circuit, sitting by designation.

dismissing his claims against Jeffrey Beard and Maryjane Hesse for lack of personal jurisdiction. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

## I.

Hannon's claims against Beard and Hesse are part of a multi-party, multi-claim lawsuit filed in the district court for the District of Massachusetts. Hannon and his fellow plaintiffs, all prisoners in Massachusetts, alleged various federal and state constitutional violations against numerous defendants, most of whom were officials in the Massachusetts Department of Corrections (DOC). However, Hannon, who was convicted in Pennsylvania and has spent most of his prison time there, also included a claim against Beard and Hesse, who were officials in the Pennsylvania DOC during the time periods relevant to this action.

Since his 1978 conviction and incarceration in Pennsylvania, Hannon has been the quintessential "jailhouse lawyer," pursuing post-conviction relief and filing numerous grievances and lawsuits on behalf of himself and other prisoners challenging their conditions of confinement. Hannon estimates that he has represented "thousands" of his fellow inmates in proceedings. He alleges that the Pennsylvania DOC grew tired of his lawsuits and agitation and, in order to prevent him from filing more lawsuits and in retaliation for the actions he had already taken, began a strategy of transferring him to out-of-state prisons.

Transfers of state prisoners to prisons in other states are effected pursuant to the Interstate Corrections Compact (Compact), which generally permits states to contract for one state's incarceration of another state's convicts in consideration for payment. Pursuant to the Compact, Hannon was transferred in 1997 to a District of Columbia prison and, in the first several months of 2001, was transferred to another District of Columbia prison, two different Maryland prisons, and eventually back to Pennsylvania. In December of 2001, he was transferred from Pennsylvania to Massachusetts. Hannon alleges that his legal materials "disappeared" during the transfer to Massachusetts.

Hannon asserts that the decision to transfer him to Massachusetts was authorized and directed by Beard, the Secretary of the Pennsylvania DOC, in retaliation for Hannon's lawsuits against DOC officers. Though Beard asserted that he has not been involved with Hannon subsequent to the transfer, he did not deny involvement leading up to the transfer.

Once in Massachusetts, Hannon sent a number of letters to Hesse, a Pennsylvania DOC prison librarian, requesting legal materials. She responded several times, sometimes denying his requests and sometimes sending requested material either to him or to a prison librarian in Massachusetts. At times, she sought legal counsel's advice to determine whether she was required to send the requested materials. She states that every

time she denied a request for material, it was because legal counsel had advised her that she was not required to supply Hannon with it.

In 2003, Hannon filed a complaint against Beard and Hesse, as well as against numerous Massachusetts prison officials, in the Massachusetts district court. His claims against Beard and Hesse allege that they violated his First and Fourteenth Amendment rights and his rights under Articles XI and XII of the Massachusetts Declaration of Rights by transferring him between prisons, confiscating his legal materials, and refusing to provide him with requested legal materials.

In January 2007, after he filed this action, Hannon learned that he was to be transferred yet again. His emergency motion for a temporary restraining order enjoining the transfer was denied, and this was affirmed by us on appeal. He was transferred to New Jersey.

Beard and Hesse filed a motion to dismiss, arguing, among other things, that the Massachusetts district court lacked personal jurisdiction over them. On June 26, 2007, the district court granted the motion and dismissed Hannon's claims against Hesse and Beard for lack of personal jurisdiction. The court reasoned that the long-arm statute did not reach Hesse or Beard because they did not "transact business" within Massachusetts: "The decision to transfer plaintiff and confiscate legal materials all occurred in Pennsylvania where the Pennsylvania defendants

reside." The district court concluded that a transfer pursuant to the Compact does not alone constitute the transaction of business in Massachusetts. Because the district court dismissed for lack of jurisdiction, it did not reach any of the other grounds for dismissal argued in Beard and Hesse's motion to dismiss. Several of Hannon's claims against other defendants, as well as other plaintiffs' claims, survived motions to dismiss. Final judgment on the dismissal of the claims against Beard and Hesse was entered pursuant to Hannon's Rule 54(b) motion, and Hannon timely appealed.

## II.

It is axiomatic that, "[t]o hear a case, a court must have personal jurisdiction over the parties, 'that is, the power to require the parties to obey its decrees.' " *Daynard v. Ness, Motley, Loadholt, Richardson, & Poole, P.A.*, 290 F.3d 42, 50 (1st Cir. 2002) (quoting *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 35 (1st Cir. 1999)). "The plaintiff bears the burden of proving the court's personal jurisdiction over a defendant." *Daynard*, 290 F.3d at 50. Under the prima facie standard, which the district court applied, we "accept the plaintiff's (properly documented) evidentiary proffers as true," and construe those facts "in the light most congenial to the plaintiff's jurisdictional claim." *Id.* at 51 (internal quotation marks and citation omitted). We review the district court's application of this standard *de novo*. *Id.*

Hannon has not alleged that Beard or Hesse

"has engaged in continuous and systematic activity" in Massachusetts; so, in the absence of general jurisdiction, the court's power will depend upon the existence of specific jurisdiction. *See id.* at 51. "Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities, such as when the litigation itself is founded directly on those activities." *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998). Furthermore, to establish personal jurisdiction, Hannon must show that "the Massachusetts long-arm statute grants jurisdiction and, if it does, that the exercise of jurisdiction under the statute is consistent with the Constitution." *Daynard*, 290 F.3d at 52.

**A.**

Because we have construed the Massachusetts long-arm statute to be coextensive with the limits allowed by the United States Constitution, we often "sidestep the statutory inquiry and proceed directly to the constitutional analysis." *See id.* However, Hannon's claim involves Pennsylvania state officials' exercise of their discretion, rather than a conventional contract or tort claim. It would be useful therefore to consider first, as the district court did, whether the Massachusetts long-arm statute reaches Beard as the Secretary of the Pennsylvania DOC and Hesse as a prison librarian for the Pennsylvania DOC. *See Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482 (5th Cir. 2008) (reasoning that, although a long-arm statute was coextensive with the limits of

due process, the statute's reach warranted consideration first because the case involved a challenge to a state official rather than a conventional contract or tort claim).

Hannon's assertion of personal jurisdiction under the long-arm statute is based on the portion of that statute providing that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's transacting any business in this commonwealth." Mass. Gen. Laws ch. 223A, § 3(a). That provision "should be construed broadly," and "does not require that the defendant have engaged in commercial activity. [The] language is general and applies to any purposeful acts by an individual, whether personal, private, or commercial." *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 982 (1st Cir. 1986) (internal quotation marks omitted). Physical presence in Massachusetts is not required in order to "transact business" in Massachusetts. *Fairview Mach. & Tool Co., Inc. v. Oakbrook Int'l, Inc.*, 56 F.Supp.2d 134, 137 (D.Mass.1999). For example, in *Hahn v. Vermont Law School*, we held that a law school "transacted business" in Massachusetts when, at plaintiff's request, it mailed application information to him in Massachusetts and later mailed him an offer of admission. 698 F.2d 48, 49 (1st Cir. 1983). We reasoned that "[t]he purposeful actions of [Vermont Law School] in mailing to [plaintiff] in Massachusetts application information and an acceptance letter were sufficient, without more, to constitute transacting business under the 'broadly construed Massachusetts long-arm

statute." *Id.* at 51. Though the mailing of the application and offer of admission were not substantial contacts, we emphasized that "less is required to support jurisdiction when the cause of action arises from the defendant's contacts with the forum ... than when it does not." *Id.*

To support jurisdiction in this case, Hannon alleges that Beard "authorized, directed, and/or effected" his transfer from the Pennsylvania DOC to the Massachusetts DOC pursuant to the Compact. The Compact creates a five-year agreement between the states, and outlines the specific procedures for transferring inmates. According to the terms of the Compact, Pennsylvania was required to send an application to Massachusetts requesting to transfer Hannon, arrange and pay for Hannon's transportation to a Massachusetts institution, transfer funds owed to Hannon to Massachusetts, furnish documents and provide legal advice as necessary to Massachusetts, pre-authorize and pay for Hannon's medical, psychiatric, and dental care or treatment in Massachusetts, and authorize Hannon's security classification, among other things. Massachusetts, in turn, was obligated to make regular reports to Pennsylvania on Hannon's conduct. *See* 61 P.S. § 1062; Mass. Gen. Law ch. 125 App., § 2-1. In sum, as Hannon alleges, when Beard arranged for the transfer between the Pennsylvania DOC and the Massachusetts DOC pursuant to an existing, on-going contract between the two, he "caused extensive services to be rendered in Massachusetts, caused payment to be made in Massachusetts, and procured the application of Massachusetts law to [ ]

Hannon's future conduct."

The contacts that Beard would have had to make to arrange for Hannon's transfer from Pennsylvania to Massachusetts are sufficient to constitute "transacting business" under the broadly-construed long-arm statute. The district court erred when it reasoned that because "[t]he decision to transfer plaintiff ... occurred in Pennsylvania," it lacked jurisdiction over Beard. A defendant need not have been physically present in the forum state in order to have "transacted business" there. *See Fairview Mach.*, 56 F.Supp.2d at 138. Just as mailing a letter and an offer of admission to Massachusetts was "transacting business" in *Hahn*, *see* 698 F.2d at 51, so can actions arranging for the transfer of Hannon to Massachusetts, which necessarily involved at least some communication and interaction between Beard in Pennsylvania and his counterparts in Massachusetts.

That Beard's actions were not "commercial" is not relevant, *see Ealing Corp.*, 790 F.2d at 982, nor is the fact that he was a state official. Beard's citation to the Fifth Circuit's decision in *Stroman Realty* does not help him. That case was filed in Texas and involved a challenge to an Arizona government official's enforcement of Arizona law in Arizona; the action attacked the validity of that law. *See Stroman Realty*, 513 F.3d at 481. By contrast, Hannon does not challenge the laws that permit a transfer, but rather alleges that Beard initiated the transfer in retaliation for and in order to hinder Hannon's exercise of constitutional rights.

Beard cites no case that suggests that prison officials cannot be subject to personal jurisdiction in a foreign state merely because they are state officials. Certainly, there are constitutional limitations on a plaintiff's ability to hale a prison official into another state, which we address shortly. Under these circumstances, though, we hold that Beard "transacted business" in Massachusetts for purposes of the state's long-arm statute, particularly because the contacts Hannon alleges form the basis for Hannon's claim against Beard.

Hannon's jurisdictional case for Hesse is far less persuasive. Hannon bases his argument on Hesse's responses to a number of written requests for legal materials that he sent to her from a Massachusetts prison. At least twice Hesse sent requested materials to a Massachusetts prison librarian (and so advised Hannon), about six times she denied Hannon's requests after receiving advice from legal counsel that she was not obligated to send the materials, and three times she directly sent Hannon the requested material.

These limited interactions do not constitute "transacting business" under the Massachusetts long-arm statute. Hesse did not initiate contact with Hannon, and she did not purposefully direct any action toward Massachusetts. She had nothing to do with Hannon's transfer there, and it was merely incidental that she sent replies to Massachusetts because that was where he happened to have been transferred. Our cases

make clear that contacts with the forum state must be "purposeful" in order to constitute the transaction of business. *See Ealing Corp.*, 790 F.2d at 982. Hesse's responses to Hannon's letters were not purposeful contacts with Massachusetts. We therefore hold that the district court did not err when it dismissed Hannon's claim against Hesse for lack of personal jurisdiction because the Massachusetts long-arm statute does not authorize personal jurisdiction over Hesse.

**B.**

Having determined that the Massachusetts long-arm statute permits jurisdiction over Beard, we must decide whether asserting jurisdiction over him would comport with the requirements of due process. "In the personal jurisdiction context, we have characterized compliance with the Constitution as implicating three distinct components, namely, relatedness, purposeful availment (sometimes called 'minimum contacts'), and reasonableness." *See Mass. Sch. of Law*, 142 F.3d at 35 (internal quotation marks and citation omitted).

1.

The first step to achieving personal jurisdiction is that "a claim must arise out of, or be related to, the defendant's in-forum activities." *Id.* (internal quotation marks and citation omitted). The relatedness standard is flexible and "focuses on the nexus between the defendant's contacts and the plaintiff's cause of action." *Adelson v. Hananel*, 510

F.3d 43, 49 (1st Cir. 2007) (internal quotation marks and citation omitted). In typical tort claims, our inquiry is "whether the plaintiff has established cause in fact (*i.e.*, the injury would not have occurred but for the defendant's forum-state activity) and legal cause (*i.e.*, the defendant's in-state conduct gave birth to the cause of action)." *Mass. Sch. of Law*, 142 F.3d at 35 (internal quotation marks and citation omitted). Although Hannon alleges a constitutional claim, section 1983 claims have been analogized to tort claims for personal jurisdiction analysis. *See, e.g., Stroman Realty*, 513 F.3d at 483 ("It also seems normally accurate to describe as torts ... § 1983 suits against public officials for individual misconduct").

Though the relatedness standard has been described as the least developed part of the due process standard, *see, e.g., Swiss Am. Bank, Ltd.*, 274 F.3d at 621, it seems clear that Hannon's claims against Beard arise from Beard's voluntary contacts with Massachusetts. Hannon alleges that Beard ordered him transferred among numerous facilities along the East Coast, including Massachusetts, in retaliation for his numerous lawsuits against the Pennsylvania DOC on behalf of himself and on behalf of other prisoners. Beard's contacts with Massachusetts in arranging for Hannon's transfer are therefore directly related to Hannon's retaliation claim, which is based on the transfer itself. Hannon's alleged constitutional injury would not have occurred "but for" Beard's arrangement for his transfer.

That Hannon was not a party to the Compact

or arrangements made between Beard and Massachusetts is not relevant to this relatedness analysis. Though it was not argued in the briefs, Beard's counsel at oral argument stressed that, because Hannon was not a party to the Compact between Pennsylvania and Massachusetts, the Compact and any arrangements made pursuant to it cannot be used by Hannon to assert jurisdiction over Beard. Indeed, Article XXXII of the Intergovernmental Agreement for the Implementation of the Compact restricts any rights under the agreement to the state parties. However, Beard provided no case law for the proposition that only a party to a contract can use the contract as a basis for asserting personal jurisdiction over another party to the contract, and we conclude that the proposition is unsound as applied to this situation. First, the relatedness requirement focuses on the nexus between the plaintiff's claim and the defendant's contacts with the forum state, not on the relationship between the plaintiff and defendant. *See Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995). This suggests it does not matter that the Compact was not between Hannon and Beard, but only that it established ties between Beard and Massachusetts, and that it formed the basis of Hannon's complaint.

Second, Hannon's claim is not for breach of contract. He does not argue that his treatment in Massachusetts or even that the transfer to Massachusetts violated the Compact. Rather, Hannon raises a constitutional claim, arguing that the transfer was in retaliation for his exercise of constitutional rights. This claim is more analogous

to a tort claim than a contract claim for jurisdictional purposes, *see Stroman Realty*, 513 F.3d at 483, and tort claims are different than contract claims for relatedness purposes. Thus, our analysis must focus on whether Beard's actions in transferring Hannon to Massachusetts caused Hannon's injury, rather than on the contractual relationship (or lack thereof) between the two.

Finally, we stress that Hannon's claim based on the unconstitutionality of the transfer itself is critical to our analysis. One of Beard's principal arguments against asserting personal jurisdiction on the basis of participation in the Compact is that it would subject Beard and his counterparts across the country to lawsuits in every state that is a party to the Compact. While we understand his concern, our decision ought not have this affect. Several district courts have declined to exercise personal jurisdiction over out-of-state defendants when prisoners transferred pursuant to the Compact sue their former prison officials in foreign states. *See, e.g., Ibrahim v. Dist. of Columbia*, 357 F.Supp.2d 187, 192-93 (D.D.C. 2004); *Meyer v. Federal Bureau of Prisons*, 940 F.Supp. 9, 12 (D.D.C. 1996); *see also Hannon v. Beard*, No. 02-1779 (D.D.C. Sept. 26, 2003), *aff'd*, No. 03-7145, 2005 WL 18052 (D.C. Cir. Jan. 4, 2005). Our holding is not in conflict with those decisions. In those cases, the prisoners sued officials from the sending state for harms that occurred while the prisoner was in the sending state, and attempted to use the contacts of the Compact to assert jurisdiction. According to the reasoning of our holding, those claims would not survive the

relatedness inquiry because the alleged contacts (the transfer pursuant to the Compact) are not related to the alleged harm (treatment in the sending state). This case turns on the unique factual situation wherein the harm alleged was directly tied to the contacts establishing personal jurisdiction. It is not a free ticket for personal jurisdiction in receiving states over any prison officials who are parties to the Compact. But here, because Hannon's claim arises directly from Beard's contacts with Massachusetts, the claim is sufficiently related under the due process standard. In short, our opinion gives no assistance for a transferred prisoner to assert a claim in the transferee court against the transferor DOC based on pre-transfer grievances.

2.

That a defendant's forum-state contacts are related to a plaintiff's claims is not enough to justify an assertion of personal jurisdiction. The defendant's contacts must also "represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's presence before the state's courts foreseeable." *Daynard*, 290 F.3d at 60. The purposeful availment requirement "ensures that jurisdiction is not based on merely random, isolated or fortuitous contacts with the forum state,"*Adelson*, 510 F.3d at 50 (internal quotation marks omitted), and is based upon the "cornerstones [of] ... voluntariness and foreseeability," *Daynard*, 290 F.3d at 61. This

means that "[t]he contacts must be voluntary and not based on the unilateral actions of another party" and "must be such that [a defendant] could reasonably anticipate being haled into court there." *Adelson*, 510 F.3d at 50 (internal quotation marks and citations omitted). "Even if a defendant's contacts with the forum are deemed voluntary, the purposeful availment prong of the jurisdictional test investigates whether the defendant benefitted from those contacts in a way that made jurisdiction foreseeable." *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 292 (1st Cir. 1999).

Whether Beard's actions in transferring Hannon from Pennsylvania to Massachusetts were a purposeful availment of the privilege of conducting business in Massachusetts is a close question. But we are convinced that Beard's contacts with Massachusetts were not "random, isolated or fortuitous." *See Adelson*, 510 F.3d at 50. According to Hannon's factual allegations, Beard intentionally and voluntarily transferred Hannon out of Pennsylvania and into Massachusetts to rid himself of a vexatious prisoner and to retaliate against Hannon for his frequent litigation. In so doing, he made Hannon subject to Massachusetts law. Arguably, Beard benefitted from subjecting Hannon to Massachusetts prisons and Massachusetts law by ridding himself of a troublemaker.

Furthermore, if it is true that Beard's transfer was made for unconstitutional reasons, Beard could not only have foreseen that Hannon would sue him but that Hannon would sue him in

Massachusetts. In fact, the Compact provides that, "The sending state and receiving state will cooperate in other matters of mutual interest in the defense of transfer-related litigation." That expressly contemplates the possibility of transfer-related litigation, and it seems reasonable to expect that the litigation could occur in either the sending state or the receiving state. Based on the voluntariness of Beard's alleged actions and the foreseeability that the transfer would spur litigation in Massachusetts, we conclude that Beard purposefully availed himself of the privilege of doing business in Massachusetts and established the requisite minimum contacts necessary to satisfy due process concerns.

3.

Finally, after considering whether a defendant's contacts are related to a plaintiff's claim and whether the defendant purposefully availed himself of the benefits of doing business in the forum state, we ask whether asserting personal jurisdiction would be reasonable. The factors we examine to consider reasonableness are: "(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies." *Id.* at 51.

First, Beard has not shown an unusual

hardship would result from having to appear in Massachusetts. It is true that appearing in Massachusetts is more burdensome for Beard than appearing in Pennsylvania. However, "staging a defense in a foreign jurisdiction is almost always inconvenient and/or costly," so "this factor is only meaningful where a party can demonstrate some kind of special or unusual burden." *See Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994) (holding that travel between New York and Puerto Rico was not an unusual burden for a defendant). Beard gives no reason why appearing in Massachusetts would be a special burden beyond ordinary inconvenience, so this factor weighs in favor of asserting personal jurisdiction.

Second, Massachusetts may have an interest in adjudicating this dispute. Hannon argues that Massachusetts has a significant interest in ensuring that out-of-state defendants do not retaliate against unwanted prisoners by casting them into Massachusetts. This may be true. Massachusetts may not want prisoners sent to its prisons in retaliation for their exercise of constitutional rights, so it has some interest in adjudicating the dispute.

Third, Hannon has some interest in litigating in Massachusetts to obtain convenient and effective relief. This court "has repeatedly observed that a plaintiff's choice of forum must be accorded a degree of deference with respect to the issue of its own convenience." *Sawtelle*, 70 F.3d at 1395. At the time this action was filed and the district court dismissed Hannon's claims against

Beard and Hesse, Hannon was incarcerated in Massachusetts. Over his objection, he has since been transferred to New Jersey. However, he still has legal counsel in Massachusetts, where the rest of this action is being litigated. He therefore maintains a valid interest in litigating his claims in Massachusetts, and we owe some deference to his choice of forum.

Fourth, litigating this issue in Massachusetts would promote the judicial system's interest in obtaining the most effective resolution of the controversy. Hannon has an attorney in Massachusetts and this case has been litigated in Massachusetts for several years already. Changing venue at this point may entail substantial judicial resources and it may be most effective to keep the action in Massachusetts. There is no reason that the Massachusetts court cannot effectively resolve a dispute between Hannon and Beard.

Finally, the interests of all sovereigns in promoting substantive social policies may weigh slightly in Hannon's favor. The substantive social policy, that transfers pursuant to the Compact should not be effected for illegal or retaliatory purposes, suggests that this issue could be litigated in Massachusetts. However, this factor does not weigh particularly in Hannon's favor because the same interest would be served in a Pennsylvania district court.

Overall, the reasonableness factors weigh in Hannon's favor. Therefore, because Hannon's claims are related to Beard's contacts, and Beard

purposefully availed himself of the privilege of doing business in Massachusetts, we hold that it would not offend due process to assert personal jurisdiction over Beard.

## III.

Because an assertion of personal jurisdiction over Beard is authorized by the Massachusetts long-arm statute, and because it comports with constitutional due process, we *reverse* the district court's order dismissing Hannon's claims against Beard for lack of personal jurisdiction and *remand* for further proceedings. However, we *affirm* the district court's dismissal of Hannon's claim against Hesse because the Massachusetts long-arm statute does not permit an assertion of personal jurisdiction over her.

**REVERSED AND REMANDED IN PART, AFFIRMED IN PART. Each party should bear its own costs.**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 03-12138-RWZ

RAYMOND COOK, et al.,

v.

MICHAEL MALONEY, et al.

MEMORANDUM OF DECISION

June 27, 2007

ZOBEL, D.J.

## I. Background

Plaintiffs, nine in number, are present or former inmates at Massachusetts Correctional Institution-Cedar Junction ("MCI-Cedar Junction"). Defendants are various employees of the Massachusetts and Pennsylvania Departments of Correction. Plaintiffs allege in a complex and lengthy amended complaint several separate and distinct sets of claims, including violations of federal and state constitutional rights as a result of, *inter alia:* (1) confiscation of prisoners' belongings during search of prisoners' cells; (2) forcible administration of medication; (3) prison

assault; and (4) retaliation for filing grievances.[1] The individual claims do not entirely coincide as to either the underlying facts or the legal theories on which they are based. In 2006, this court appointed counsel and plaintiffs filed an Amended Complaint (Docket # 76). Now pending are several motions, including dispositive motions filed by both the Massachusetts and Pennsylvania defendants. I address the pending motions seriatim below.

## II. Pending Motions

### 1. Massachusetts Defendants' Motion to Dismiss (Docket # 90)

The Massachusetts defendants have moved to dismiss (or in alternative, for summary judgment) several of plaintiffs' claims. In particular, defendants seek to dismiss the

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[1] In particular, plaintiffs Sean Milliken, Raymond Cook, Francis Hannon, Wayne Crosby, Kevin King, Joseph LoDico, William Whyte, Larry MacArthur and Steven Balsavich (hereinafter collectively "plaintiffs") bring several claims against defendants Michael T. Maloney, Peter Allen, Fred Callender, Jim Sullivan, Jeffrey M. Grimes, Gilbert Lemon, Richard Medeiros, Paul Duford, Richard McArthur, Kenneth L. Deorsey, Kristie Ladouceur, Dr. Robert Kolbert, Dr. Herbert Berger-Hershkowitz, Gary Fyfe and John Does # 1-50 (unnamed correctional officers) (hereinafter "Massachusetts defendants") and Dr. Jeffrey Beard and MaryJane Hesse (hereinafter "Pennsylvania defendants").

following: (1) claims by all plaintiffs regarding confiscation and retaliation (Counts I & II of the Amended Complaint); (2) claims by plaintiff Milliken regarding prison assault (Counts III & IV); (3) claims by plaintiff Cook regarding anti-psychotic medication (Count VII, VIII, IX & X); (4) claims by plaintiff Hannon regarding prison assault (Counts XIII & XIV); and (5) portions of plaintiff Milliken's retaliation claim (Counts V & VI).

### A. Counts I & II: Claims By All Plaintiffs Regarding Confiscation and Retaliation

All plaintiffs allege retaliation as a result of cell searches conducted on two separate occasions (June 18-19, 2003 and August 12-15, 2003). Defendants move to dismiss on the grounds that: (1) plaintiffs failed to exhaust available state remedies and are therefore precluded from pursuing a civil action under the Prison Litigation Reform Act of 1996 ("PLRA"), 42 U.S.C. § 1997e; (2) plaintiffs fail to state a claim against the Massachusetts defendants in their official capacities for money damages; and (3) plaintiffs fail to state a claim upon which relief may be granted. (Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 14.)

#### i. Failure to Exhaust Administrative Remedies

First, with respect to plaintiffs LoDico and Balsavich, plaintiffs' counsel has been unable to contact these plaintiffs to ascertain whether in fact they filed grievances. (Docket # 103, Pls .' Opp. to

Mass. DOC Defs.' Mot. to Dismiss at 13-14.) Accordingly, their claims are DISMISSED.

Second, it appears that plaintiff Cook does not contest that he did not file a grievance regarding the two cell searches. (*See generally* Docket # 103, Pls.' Opp. to Mass. DOC Defs.' Mot. to Dismiss.) Accordingly, his claim is DISMISSED.

Third, it is uncontroverted that plaintiff Hannon's grievance regarding the August 14, 2003, cell search exhausted administrative remedies. (*See* Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 11-12.) Moreover, the grievance he filed with respect to the June 18-19, 2003, cell search also satisfies the exhaustion requirement. (*See* Docket # 91-15, Aff. of Ann Marie Aucoin, Ex. 2, Grievance No. 03-623, 837.)

Fourth, the Massachusetts defendants do not dispute that plaintiff Milliken exhausted his administrative remedies with respect to the August 14, 2003, cell search, and defendants do not move to dismiss with respect to this count. (Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 12-13.) In addition, the grievance he filed with respect to the June 19, 2003, cell search also satisfies the exhaustion requirement. (*See* Docket # 91-15, Aff. of Ann Marie Aucoin, Ex. 2, Grievance No. 03-622, 1240) (requesting that the DOC staff be counseled about "retaliating against inmates for involvement in constitutionally protected activity")).

Fifth, the grievances filed by plaintiffs King,

McArthur and Crosby are adequate to exhaust administrative remedies. (*See generally* Docket # 91-15, (King grievances) Aff. of Ann Marie Aucoin, Ex. 1, Grievance No. 03-625, 1046-47; (McArthur grievances), *id.*, Ex. 1, No. 03-636, 1087; and (Crosby grievances), *id.*, Ex. 3, Nos. 03-770-71; 625-26; 628-29.)

Finally, the Massachusetts defendants contend that plaintiff Whyte failed to file grievances. However, plaintiff contends that he did file grievances and appeals, but that he no longer possesses a record of those grievances. (*See* Docket # 108, Decl. of William Whyte, ¶¶ 4-6.) There is clearly a factual issue here that precludes this court's grant of summary judgment (or any of the alternatively pled dispositive motions) on this question.

**ii. Eleventh Amendment Bar to Suit Against Prison Officials in Their Official Capacities**

It is well established that plaintiffs may not recover monetary damages under 42 U.S.C. § 1983 against defendants in their *official* capacities. *See Johnson v. Rodriguez,* 943 F.3d 104, 108 (1st Cir.1991). However, plaintiffs here seek monetary damages against defendants in their *individual* capacities only. (*See* Docket # 76, Amended Complaint ¶ 109.) Such damages are not barred by the Eleventh Amendment and, accordingly, defendants' argument fails. *See Johnson,* 943 F.3d at 109. To the extent plaintiffs proceed against the Massachusetts defendants in their official

capacities, they do so for prospective injunctive relief only. (See Docket # 76, Amended Complaint, ¶ 109); *see also Caisse v. DuBois*, 346 F.3d 213, 218 (1st Cir. 2003) ("the Eleventh Amendment bars 'official capacity suits' against state actors in federal court unless the suit seeks prospective injunctive relief".)

**iii. Failure to State a Claim**

Finally, the Massachusetts defendants contend that plaintiffs' amended complaint fails to state a claim because it fails adequately to allege facts sufficient to support a finding of: (1) supervisory liability (*see* Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 16-17); and (2) retaliation. (*Id.* At 18-29.) Contrary to defendants' assertions, there are numerous allegations that the defendants ignored the June grievances filed prior to the August cell search and that such actions directly resulted in the alleged constitutional violation. (*See* Docket # 76, Amended Complaint ¶¶ 48, 91). In addition, with respect to the retaliation claim, plaintiffs must be "able to demonstrate that the alleged improper decision would not have been made 'but for' the impermissible purpose of retaliation." *Layne v. Vinzant*, 657 F.2d 468, 475 (1st Cir. 1981). Here, there is an issue of fact as to the motivation for the cell searches, which precludes a grant of summary judgment.

**iv. Conclusion**

Accordingly, with respect to Counts I & II,

the Massachusetts defendants' motion to dismiss is ALLOWED as to plaintiffs LoDico, Balsavich and Cook, and it is DENIED as to plaintiffs Hannon, Milliken, King, McArthur, Crosby and Whyte.

### B. Counts III & IV: Claims By Plaintiff Milliken Regarding Prison Assault

Plaintiff Milliken sues the Massachusetts defendants for violations of 42 U.S.C. § 1983 and the Massachusetts state constitution as a result of his having been assaulted by another inmate on December 9, 2003. Defendants contend that Counts III & IV must be dismissed because plaintiff: (1) failed to exhaust his administrative remedies (Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 16); (2) fails to allege that defendants Duford, Ladouceur, Maloney or Allen "had a personal involvement in his alleged assault" or were "supervisors of the officers who allegedly 'ordered' the assault."(*Id.* at 17.)With respect to exhaustion of administrative remedies, there is a dispute over whether Milliken in fact filed a grievance (*see* Docket # 107, Decl. of Sean Milliken ¶ 13) and, therefore, there is clearly a factual issue here that precludes this court's grant of summary judgment (or any of the alternatively pled dispositive motions).

Next, defendants are incorrect that plaintiff Milliken failed adequately to state a claim based on supervisory liability. (*See* Docket # 76, Amended Complaint ¶¶ 37-61) (alleging personal involvement against defendants Duford and Ladouceur). Moreover, plaintiff Milliken alleges

that defendants Maloney and Allen were deliberately indifferent. (*See* Docket # 76, Amended Complaint ¶¶ 37-61.) Accordingly, the Massachusetts defendants' motion to dismiss is DENIED as to Counts III & IV.

### C. Counts V & VI: Portions of Plaintiff Milliken's Retaliation Claim

Defendants contend that Milliken's counts alleging retaliation for his filing grievances and lawsuits against several correctional officers as a result of defendants' search of his cell on June 19, 2003, and August 14, 2003, should be dismissed because plaintiff: (1) failed to exhaust his administrative remedies (Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 12); and (2) fails to allege that the cell searches were undertaken in retaliation for filing grievances and lawsuits. (*Id.* at 2-9.)As noted above, I find that plaintiff Milliken's grievance with respect to the June 2003 search was sufficient to exhaust his administrative remedies; defendants do not contest the sufficiency of the August 2003 grievance. Moreover, as noted above, I conclude that plaintiffs have adequately alleged retaliation. Finally, plaintiff Milliken also alleges that the defendants retaliated against him by prohibiting him from being visited by his daughter. Defendants move to dismiss on the ground that there was a non-retaliatory rationale for prohibiting such visits. The DOC's motivation presents an issue of fact which precludes this court's grant of summary judgment here. Accordingly, defendants' motion to dismiss is DENIED as to Counts V & VI.

**D. Counts VII, VIII, IX & X: Claims By Plaintiff Cook Regarding Anti-Psychotic Medication**

Defendants contend that plaintiff Cook's claims arising from his being forcibly administered anti-psychotic medication and thereafter being placed in segregated confinement in June 2001 must be dismissed because: (1) plaintiff Cook has not exhausted his administrative remedies with respect to his claims (Docket # 91-1, Mem. of Law in Supp. of Mass. DOC Defs.' Mot. to Dismiss at 9); (2) there are "no factual allegations connecting any of these defendants to any allegations by plaintiff Cook"(*id.* at 17); (3) "none of these defendants are alleged to supervise any of the defendants identified by plaintiff Cook as having taken any actions to violate his constitutional rights"(*id.*); and (4) "two doctors identified in the Amended Complaint are employees of the contractual medical provider, UMass Correctional Medical Services."(*Id.*).

First, while plaintiff concedes that he did not submit grievances and appeals regarding the June 2001 incident, courts have excused prisoners from the grievance requirement where the prisoner's access to the grievance process was in some manner inhibited. *See, e.g., Giano v. Goord*, 380 F.3d 670, 677 (2d Cir. 2004). Here, Cook argues that he was unable to file a grievance "[a]s a result of the incapacitating side effects of the anti-psychotic medication, *and after being denied legal material, pen, paper and stamps.*"(Docket # 103, Pls.' Opp. to

Mass. Defs.' Mot. to Dismiss at 16) (emphasis in original).)

Second, the Amended Complaint does in fact allege the direct personal involvement and supervisory status against defendants Allen and Maloney. (*See* Amended Complaint ¶ 78 ("Upon information and belief, the decision to place Mr. Cook on anti-psychotropic medication and relocate him to segregated confinement away from his legal materials and resources was made or approved by defendants Allen, Maloney....")). Plaintiff concedes that the Amended Complaint contains no "specific allegations" against defendants Ladouceur and Duford, but contends that "discovery has been limited and further proceeding may reveal their involvement therein."(Docket # 103, Pls.' Opp. to Mass. DOC Defs.' Mot. to Dismiss at 24 & n. 12). Finally, plaintiff contends that there is an issue of fact regarding the two employees who are alleged to be employees of the contractual medical provider, UMass Correctional Medical Services, which precludes the grant of summary judgment. Plaintiff's arguments are persuasive here. Accordingly, the motion to dismiss is DENIED as to Counts VII, VIII, IX & X.

### E. Counts XIII & XIV: Claims By Plaintiff Hannon Regarding Prison Assault

Plaintiff Hannon's § 1983 claim for prison assault is dismissed because plaintiff concedes that he did not file the required grievances regarding the assault. (*See* Docket # 103, Pls.' Opp. to Mass.

DOC Defs.' Mot. to Dismiss at 18 & n. 8.) Accordingly, the Massachusetts defendants' motion to dismiss is ALLOWED as to Counts XIII & XIV.

**F. Conclusion: Massachusetts Defendants' Motion to Dismiss**

Thus, the Massachusetts defendants' motion to dismiss is **DENIED** with respect to **Counts III, IV, V, VI, VII, VII, IX & X** and **ALLOWED** with respect to **Counts XIII & XIV.**With respect to **Counts I & II,** the motion is **ALLOWED** as to plaintiffs LoDico, Balsavich and Cook, and **DENIED** as to plaintiffs Hannon, Milliken, King, McArthur, Crosby and Whyte.

**2. Pennsylvania Defendants' Motion to Dismiss (Docket # 92)**

The two Pennsylvania defendants, Dr. Jeffrey A. Beard, Secretary of the Pennsylvania Department of Corrections, and MaryJane Hesse, librarian at the State Correctional Institution at Mahanoy ("SCI-Mahanoy"), move to dismiss all counts against them, namely, for retaliatory transfer (Counts XI & XI I)[2] and for deliberate

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[2] Plaintiff Hannon has also sued *both* Pennsylvania and Massachusetts defendants for violations of 42 U.S.C. § 1983 and the Massachusetts state constitution as a result of his being transferred from Massachusetts to Pennsylvania. (Counts XI & XII.) However, the Massachusetts defendants do not separately state grounds for the dismissal of such claims.

indifference to plaintiff's prison assault (Counts XIII & XIV).[3] In support of their motion, the Pennsylvania defendants contend that: (1) the court lacks personal jurisdiction over the Pennsylvania defendants; (2) plaintiff failed to exhaust available state remedies; and (3) plaintiff fails to state a claim against the Pennsylvania defendants in their official capacities for money damages. (Docket # 92-1.)

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Accordingly, these counts remain against the Massachusetts defendants.

[3] The Amended Complaint appears to allege Counts XIII & XIV against the Pennsylvania defendants as well as the Massachusetts defendants. (Docket # 76, Amended Complaint ¶¶ 151-156.) However, there appears to be a dispute as to which claims are alleged against the Pennsylvania defendants. (*Compare* Docket # 93-2, Pennsylvania Defs.' Statement of Material Facts in Supp. of Mot. for Summ. J.¶ 1 ("The only claim against the Pennsylvania defendant is found in Count XI of the Amended Complaint."), *with* Docket # 101, plaintiff Hannon's Counterstatement of Disputed Material Facts ¶ 1 ("[Plaintiff] states claims against the Pennsylvania defendants in Counts XI & XII of the Amended Complaint.").) The Pennsylvania defendants do not appear to have moved to dismiss Counts XIII-XIV. However, for the reasons discussed, *infra*, Section II.2, the court lacks jurisdiction over the Pennsylvania defendants and all claims against them are dismissed.

In general, courts may exercise either general or specific jurisdiction over a defendant. *See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998). To invoke general jurisdiction, the defendant must be shown to have "continuous and systematic" contacts with the forum state. *Id.* Here, plaintiff does not contend that defendants' contacts with Massachusetts are continuous or systematic enough to establish general jurisdiction.

Therefore, the relevant inquiry here is whether the court has specific jurisdiction under Massachusetts law. Specific jurisdiction exists where there is a "demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities."*Id* . Such a determination requires both: (1) that the contacts satisfy the Massachusetts long-arm statute; and (2) "that the exercise of jurisdiction under the statute is consistent with the [due process provisions of the] constitution." *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 52 (1st Cir. 2002). First, the exercise of jurisdiction must comport with the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3, which provides for personal jurisdiction over a defendant if the cause of action arises from the defendant's:

> (a) transacting any business in this commonwealth;
>
> (b) contracting to supply services or things in this commonwealth;

> (c) causing tortious injury by an act or omission in this commonwealth;
>
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered....

Mass. Gen. Laws ch. 223A, § 3. Second, for the exercise of jurisdiction to comport with due process, the defendant must have "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daynard,* 290 F.3d at 52 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted)).

Plaintiff here alleges that there is jurisdiction by virtue of the fact that the Pennsylvania defendants "transacted business" in Massachusetts under Mass. Gen. Laws ch. 223A, § 3(a). This is incorrect. The decision to transfer plaintiff and confiscate legal materials all occurred in Pennsylvania where the Pennsylvania defendants reside. Plaintiff cites no authority for the proposition that mere transfer pursuant to the Intergovernmental Agreement for the Implementation of the Interstate Corrections Compact, Mass. Gen. Laws ch. 125, § App. 2-1, constitutes the transaction of business in Massachusetts. This court lacks jurisdiction over

the Pennsylvania defendants and need not reach defendants' other grounds for dismissal. Accordingly, the Pennsylvania defendants' motion to dismiss Counts XI, XII, XIII & XIV is **ALLOWED.**

**3. Plaintiff Hannon's Emergency Motion for Sanctions (Docket # 81)**

Plaintiff Hannon seeks sanctions in the amount of $70.99 against the Massachusetts Department of Corrections Defendants ("DOC") and an order directing it to observe this court's previous orders (Docket # 45) directing officials to allow *pro se* inmate-to-inmate correspondence to the extent permitted by regulation. (Docket # 81.) Plaintiff contends that several filings were not received by the court or defendants in his action in the District of Columbia Superior Court as well as in this court. In its opposition (Docket # 83), the DOC defendants point out that counsel for Clark Color Labs did receive plaintiffs' opposition in August 2005, but failed to receive additional opposition from plaintiffs because none was ever filed. However, it seems that the DOC, under the mistaken impression that plaintiffs were represented by counsel and were no longer *pro se* in their action against Clark Color Labs, may have impeded communication amongst co-plaintiffs. (Docket # 83, Mass. Defs.' Opp. to Pl. Hannon's Motion for Sanctions ¶ 5). They now state, however, that "[p]rovided that all correspondence is solely about these claims, these plaintiffs are being permitted to correspond until the case against Clark Color Labs is completed."*Id.* In light of defendants' agreement,

plaintiff Hannon's motion is **DENIED.** The court reiterates that *pro se* plaintiffs are to have the right to unimpeded legal correspondence with co-plaintiffs. However, the court notes that the action against Clark Color Labs has been dismissed. (Docket # 87).

**4. Plaintiffs' Motion to Compel Defendants to Produce Documents (Docket # 110)**

Plaintiffs seek an order compelling defendants to respond to Plaintiffs' First Request for the Production of Documents. (Docket # 110.) Defendants filed their opposition (Docket # 115) on October 20, 2006, in which they request that they not be ordered to comply "until [the court] decides the issues raised in defendants' dispositive motion."(Docket # 116, Mass. Defs.' Mem. of Law in Support of Their Opposition to Pls.' Mot. to Compel at 12.) Since the dispositive motions have now been decided, plaintiffs' motion to compel is **ALLOWED.**

**5. Massachusetts Defendants' Motion to Strike (Docket # 114)**

The Massachusetts defendants move to strike portions of Hannon's Declaration (Docket # 102) and Cook's Declaration (Docket # 106) on the grounds that certain statements in the declarations contain inadmissible hearsay. (Docket # 114.) This motion is **ALLOWED** to the extent of the hearsay statements.

**6. Pennsylvania Defendants' Motion to Strike (Docket # 118)**

The Pennsylvania defendants also move to strike portions of Hannon's Declaration (Docket # 102) and Cook's Declaration (Docket # 106) on the grounds that certain statements in the declarations fail to "set forth such facts as would be admissible in evidence."(Docket # 118, Mot. to Strike Portions of [Hannon's] Decl. ¶ 7.) This motion is **ALLOWED** to the extent of the hearsay statements.

**7. Plaintiffs' Unopposed Motion for Leave to Take in Excess of Ten Depositions (Docket # 132)**

There are sixteen named defendants in this action. Plaintiffs have deposed four defendants and noticed the depositions of four additional defendants. Plaintiffs now seek leave of court to depose up to twenty persons. As the motion is unopposed, it is **ALLOWED.**

June 26, 2007

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

**United States Court of Appeals**
**For the First Circuit**

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No. 07-2272

FRANCIS HANNON,
Plaintiff, Appellant,

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RAYMOND COOK; SEAN MILLIKEN; WAYNE D. CROSBY; LAWRENCE M. MCARTHUR; KEVIN KING; HENRY LAPLANTE; WILLIAM WHITE; CHRISTOPHER DEMARCO; ANGEL PIMENTAL; JOSEPH LODICO; STEVEN BALSAVICH; and EDWARD KEITH,

Plaintiffs,

v.

JEFFREY BEARD and MARYJANE HESSE,

Defendants, Appellees,

---

MICHAEL T. MALONEY; PETER ALLEN; KRISTIE LADOUCEUR; KENNETH DEORSEY; PAUL DUFORD; JEFFREY GRIMES; RICHARD MEDEIROS; GILBERT LEMON, II; JOHN DOES 1-50; CLARK COLOR LAB; VINCENT MOONEY; MASSACHUSETTS DEPARTMENT OF CORRECTIONS; FREDERICK CALLENDAR; RICHARD MCARTHUR; JAMES SULLIVAN; GARY FYFE; ROBERT KOLBER; and HERBERT BERGER-HERSHKOWITZ,

Defendants

Before
Boudin, Chief Judge,
Wallace,* Senior Circuit Judge,
Torruella, Lynch, Lipez and Howard, Circuit Judges.

**ORDER OF COURT**
Entered: June 6, 2008

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk

* Of the Ninth Circuit, sitting by designation

Supreme Court, U.S.
FILED
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No. 08-326

IN THE

# Supreme Court of the United States

JEFFREY BEARD,
*Petitioner,*

v.

FRANCIS HANNON,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state corrections official is subject to personal jurisdiction in a foreign state when he personally directed the transfer of an inmate to the foreign state's corrections system, and the inmate's claim arises out of and directly relates to the alleged retaliatory nature of the transfer itself?

## PARTIES TO THE PROCEEDING

Petitioner is Jeffrey Beard, Secretary of the Pennsylvania Department of Corrections. Respondent is Francis Hannon, a Pennsylvania inmate who was transferred from the Pennsylvania Department of Corrections to the Massachusetts Department of Correction pursuant to the Interstate Corrections Compact allegedly in retaliation for engaging in constitutionally-protected legal activities.[1]

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[1] MaryJane Hesse, who is represented by counsel for the Petitioner, was a party in the proceedings in the Court of Appeals but has no direct interest in the outcome of the petition for a writ of certiorari. Respondent did not appeal the decision of the Court of Appeals with respect to Ms. Hesse.

The following parties were listed on the docket in the Court of Appeals but did not participate in the proceedings in that court: Raymond Cook, Sean Milliken, Wayne D. Crosby, Lawrence M. McArthur, Kevin King, Henry LaPlante, William Whyte, Christopher DeMarco, Angel Pimental, Joseph Lodico, Steven Balsavich, Edward Keith, Michael T. Maloney, Peter Allen, Kristie LaDouceur, Kenneth Deorsey, Paul Duford, Jeffrey Grimes, Richard Medeiros, Gilbert Lemon, II, John Does 1-50, Clark Color Lab, Vincent Mooney, Massachusetts Department of Correction, Frederick Callendar, Richard McArthur, James V. Sullivan, Gary Fyfe, Robert Kolber, and Herbert Berger-Hershkowitz. Respondent believes that these parties have no direct interest in the outcome of the petition for writ of certiorari.

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## STATEMENT OF THE CASE

This case involves the issue of whether personal jurisdiction lies over an out-of-state corrections official when that official ordered the transfer of an inmate to the forum state, allegedly in retaliation for the inmate's exercise of constitutionally-protected rights. Pet. App. 3a-5a. Specifically, this case arises out of Petitioner's personal direction to transfer a Pennsylvania inmate from a Pennsylvania correctional facility to a Massachusetts correctional facility pursuant to the Interstate Corrections Compact ("ICC"). *Id.* The U.S. Court of Appeals for the First Circuit held that a Massachusetts court could properly assert jurisdiction over Petitioner on the unique facts of this case because Respondent's claim relates specifically to the allegedly retaliatory nature of the transfer itself (unlike a claim involving general post- or pre-transfer grievances). Pet. App. 15a-16a. By issuing that fact-specific, narrowly-tailored opinion, the First Circuit reached a result that was not only correct on the law, but also one that will have a limited impact on prison administration and federal court dockets.

Petitioner Jeffrey Beard is the Secretary of the Pennsylvania Department of Corrections, a cabinet-level position that, according to Petitioner, "supervises over 14,000 employees and oversees the operation of more than two dozen state correctional institutions and other facilities housing over 45,000 prisoners." Pet. 3. Despite Beard's implication that he is far-removed from inmate-specific decisions, the First Circuit observed that "[t]hough Beard asserted that he has not been involved with Hannon

subsequent to the transfer, he did not deny involvement leading up to the transfer." Pet. App. 4a.[2]

Respondent Francis Hannon was convicted in 1978 in Pennsylvania and initially incarcerated in the Pennsylvania Department of Corrections. Pet. App. 3a. Since his incarceration, Hannon has been characterized as the "quintessential 'jailhouse lawyer'" because he has vigorously pursued his own post-conviction relief, filed numerous grievances and lawsuits challenging the conditions of his confinement in prison, assisted other inmates in filing their grievances and lawsuits, and represented thousands of inmates in disciplinary proceedings. *Id.* Hannon obtained favorable outcomes in many of those litigations and disciplinary proceedings. Br. of Plaintiff-Appellant Francis Hannon 8, *Hannon v. Beard*, 524 F.3d 275 (1st Cir. 2008) ("Respondent's Opening Brief").

Over the last 20 years, Hannon has not received a single disciplinary report for any infraction in any correctional facility in any state. *See id.* at 10 n.2. Indeed, Pennsylvania prison officials have openly acknowledged in written communications to other prison systems that Hannon is not a management problem or a threat to staff or other inmates. *Id.* at 10. Nevertheless, from 1997 to 2001, Hannon was transferred among six different correctional facilities in five different jurisdictions

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[2] Subsequent document discovery and Beard's sworn deposition testimony has elaborated on the extensive degree of his personal, direct and unprecedented involvement in Hannon's transfer.

(Pennsylvania, Massachusetts, Virginia, Maryland and the District of Columbia). Pet. App. 4a.

On December 24, 2001, Hannon was transferred from the Pennsylvania Department of Corrections to the Massachusetts Department of Correction. Pet. App. 4a. During that interstate transfer, many of Hannon's legal materials disappeared and were never returned upon his arrival in Massachusetts. *Id.* Hannon alleges that Beard directed this transfer in retaliation for Hannon's advocacy and litigation against Beard and other prison officials. Pet. App. 4a.[3]

Hannon's transfer to the Massachusetts Department of Correction was effected pursuant to the ICC and an agreement executed in furtherance of the ICC statutes passed by the Massachusetts and Pennsylvania legislatures, the Intergovernmental Agreement For The Implementation Of The Interstate Corrections Compact (the "ICC Contract"). *See* Mass. Gen. Laws ch. 125 App., § 2-1; 61 Pa. Stat. Ann. §§ 1061-63; Reply Addendum of Plaintiff-Appellant Francis Hannon at 1-13, *Hannon v. Beard*,

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[3] After the Massachusetts Department of Correction likewise tired of Hannon's advocacy activities, in 2007 Hannon was remitted back to the Pennsylvania Department of Corrections, which immediately effected his transfer to the department of corrections of a sixth state, this time New Jersey. Pet. App. 5a. Hoping to prevent yet another transfer, Hannon sought emergency injunctive relief from the District Court. *See id.* That petition was denied, and the decision was affirmed on expedited appeal to the First Circuit. *See id.* Hannon continues to serve his sentence in New Jersey. *See id.*

524 F.3d 275 (1st Cir. 2008).[4] The ICC statutes and the ICC Contract confer reciprocal benefits and create ongoing obligations, including the right to exchange inmates with the other Commonwealth, the obligation to pay for certain medical, psychiatric or dental expenses of the transferred inmate and the obligation to provide periodic progress reports on the inmate. *Id.*

While incarcerated in the Massachusetts Department of Correction system, Hannon and several other Massachusetts inmates timely commenced an action *pro se* in the U.S. District Court for the District of Massachusetts against Massachusetts and Pennsylvania corrections officials alleging various state and federal constitutional

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[4] The stated purpose and policy of the ICC statutes are as follows:

> The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting [economies] in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

Mass. Gen. Laws ch. 125 App. § 2-1; 61 Pa. Stat. Ann. § 1062, at I.

violations. Pet. App. 3a. The District Court subsequently appointed undersigned counsel, which filed an amended complaint. *See id.* at 23a. In his amended complaint, Hannon asserted several state and federal claims, including a claim that Beard pursued a strategy of transferring Hannon to out-of-state corrections facilities and confiscating various legal materials in retaliation for Hannon's constitutionally-protected advocacy on behalf of himself and other inmates. *Id.* at 3a. Hannon also alleged that a Pennsylvania Department of Corrections librarian, MaryJane Hesse, improperly refused to provide certain legal research materials and thereby restricted his access to the courts. *Id.* at 4a. Hannon seeks damages and injunctive relief. Pet. 4.

In the District Court, Beard and Hesse filed a motion to dismiss on several grounds, including lack of personal jurisdiction. Pet. App. 32a-36a. Only reaching the jurisdictional analysis, the District Court granted the motions to dismiss on the grounds that the Massachusetts long-arm statute did not reach Beard or Hesse because they did not "transact business" within Massachusetts. *Id.* In reaching its conclusion, the District Court did not engage in the constitutional due process analysis for personal jurisdiction. *Id.* The District Court certified its decision as a final judgment pursuant to Fed. R. Civ. P. 54(b). Hannon timely appealed. Pet. App. 6a.

The First Circuit reversed as to Beard, but affirmed as to Hesse. Pet. App. 21a. Although the Court of Appeals had previously "construed the Massachusetts long-arm statute to be coextensive

with the limits allowed by the United States Constitution," the First Circuit reasoned that it would be useful to consider whether the Massachusetts long-arm statute reached Beard and Hesse because Hannon's claim "involves Pennsylvania state officials' exercise of their discretion." Pet. App. 7a. Focusing closely on the particular facts of this case (which, unlike other prison cases, challenges the transfer itself), the First Circuit held that "[t]he contacts that Beard would have had to make to arrange for Hannon's transfer from Pennsylvania to Massachusetts are sufficient to constitute 'transacting business' under the broadly-construed long-arm statute."[5] Pet. App. 10a.

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[5] Indeed, the First Circuit recited in exhaustive detail the extensive contacts that the ICC transfer of Hannon created:

> Pennsylvania was required to send an application to Massachusetts requesting to transfer Hannon, arrange and pay for Hannon's transportation to a Massachusetts institution, transfer funds owed to Hannon to Massachusetts, furnish documents and provide legal advice as necessary to Massachusetts, pre-authorize and pay for Hannon's medical, psychiatric, and dental care or treatment in Massachusetts, and authorize Hannon's security classification, among other things. Massachusetts, in turn, was obligated to make regular reports to Pennsylvania on Hannon's conduct. In sum, as Hannon alleges, when Beard arranged for the transfer between the Pennsylvania DOC and the Massachusetts DOC pursuant to an existing, ongoing contract between the two, he "caused extensive services to be rendered in Massachusetts, caused payment to be made in Massachusetts, and procured the application of Massachusetts law to [ ] Hannon's future conduct."

Pet. App. 9a-10a (internal citation omitted).

The First Circuit then articulated and applied this Court's settled constitutional test for personal jurisdiction. Pet. App. 12a-21a; *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985). In each step of its jurisdictional analysis, the First Circuit emphasized the fact that Hannon's claim in this case specifically related to the allegedly-retaliatory nature of the ICC transfer itself and Beard's personal involvement in that transfer. Pet. App. 13a-21a. For the relatedness prong, the First Circuit stated that "we stress that Hannon's claim *based on the unconstitutionality of the transfer itself is critical to our analysis.*" Pet. App. 15a (emphasis added). The First Circuit further reasoned that "Beard's contacts with Massachusetts in arranging for Hannon's transfer are therefore directly related to Hannon's retaliation claim, *which is based on the transfer itself.*" Pet. App. 13a (emphasis added).

For the minimum contacts (or purposeful availment) prong, the First Circuit stated that it was "convinced that Beard's contacts with Massachusetts were not 'random, isolated or fortuitous'" and that "Beard [benefited] from subjecting Hannon to Massachusetts prisons and Massachusetts law by ridding himself of a troublemaker." Pet. App. 17a (citation omitted).[6]

For the reasonableness prong, the First Circuit employed the familiar five-factor test precisely as set

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[6] The First Circuit went further, emphasizing that, "if it is true that Beard's transfer was made for unconstitutional reasons, Beard could not only have foreseen that Hannon would sue him but that Hannon would sue him in Massachusetts." Pet. App. 17a-18a.

forth by this Court in *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102 (1987). In its analysis the First Circuit relied in part on the facts that his litigation had already been pending in Massachusetts for several years and that Hannon secured court-appointed legal counsel in Massachusetts. Pet. App. 18a-21a. The First Circuit also noted that Beard identified "no reason why appearing in Massachusetts would be a special burden beyond ordinary inconvenience." Pet. App. 19a. As a policy matter, the First Circuit also properly weighed "the interests of all sovereigns in promoting substantive social policies." Pet. App. 20a. Based on this extensive analysis, the First Circuit concluded that the Massachusetts court could permissibly assert personal jurisdiction over Beard. Pet. App. 21a.

Significantly, the First Circuit expressly stated:

> [W]e stress that Hannon's claim based on the unconstitutionality of the transfer itself is critical to our analysis. One of Beard's principal arguments against asserting personal jurisdiction on the basis of participation in the Compact is that it would subject Beard and his counterparts across the country to lawsuits in every state that is a party to the Compact. While we understand his concern, our decision ought not have this [e]ffect.

Pet. App. 15a. The First Circuit reached this conclusion reasoning that routine complaints concerning an inmate's conditions of confinement are excluded from the court's holding "because the alleged contacts (the transfer pursuant to the [ICC])

are not related to the alleged harm (treatment in the sending state)." *Id.* at 16a.

The First Circuit further stressed that its narrow holding was based on the "unique factual situation" presented by this case and that its holding did not provide "a free ticket for personal jurisdiction in receiving states over any prison officials who are parties to the Compact." Pet. App. 16a.[7]

Beard filed a motion for rehearing or rehearing en banc, which the First Circuit denied. Pet. App. 39a-40a. Beard filed his petition for a writ of certiorari in this Court, and thereafter a consolidated amicus brief in support of the petition for certiorari was filed by the State of Indiana on behalf of itself and 22 additional States and Commonwealths.

## REASONS TO DENY THE PETITION

The question presented in the petition does not warrant review for several compelling reasons: (1) the First Circuit properly applied this Court's settled personal jurisdiction jurisprudence to the unique facts of this case, (2) this Court has repeatedly declined to review substantially similar issues, as recently as last month, (3) Beard concedes that there is no conflict among the Courts of Appeals on the narrow issue presented in the petition, (4) the

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[7] Applying this same legal framework, the First Circuit concluded that the factual allegations against Hesse were insufficient to support jurisdiction in Massachusetts. The First Circuit reasoned that Hesse's "limited interactions" in connection with sending certain letters and legal materials to Massachusetts were "merely incidental" and therefore did not permit an assertion of jurisdiction. Pet. App. 11a.

jurisdictional issue in this case has not been the subject of varying lower court decisions and is not ripe for this Court's review and (5) the First Circuit's analysis neither expands jurisdiction beyond its existing constitutional reach nor constricts jurisdiction to unfairly advantage one class of defendants to the exception of others. Therefore, the petition should be denied.

## I. THE FIRST CIRCUIT PROPERLY APPLIED ESTABLISHED SUPREME COURT PRECEDENT

The First Circuit properly applied the settled, fact-dependent personal jurisdiction analysis articulated by this Court and consistently applied for decades. *See* Pet. App. 6a-21a. Indeed, the First Circuit engaged in a detailed analysis of the Massachusetts long-arm statute and meticulously applied the constitutional due process framework, including an extensive assessment of the relatedness, purposeful availment, and reasonableness prongs. *See* Pet. App. 12a-21a. For each prong, the First Circuit emphasized the unique circumstances of this case, most importantly focusing on the fact that Hannon's particularized factual allegations against Beard related to the allegedly retaliatory nature of the transfer itself (as opposed to a claim concerning Hannon's general conditions of confinement in Massachusetts). *See Burger King*, 471 U.S. at 485-86 (recognizing that "the facts of each case must [always] be weighed" to determine whether personal jurisdiction is proper (citing *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978)) (internal quotation marks omitted)).

In suggesting a conflict with this Court's prior rulings, Beard primarily contends that the First Circuit's jurisdictional assessment did not place sufficient emphasis on state sovereignty and Beard's status as a state official. Pet. 12-15. This argument fails as a matter of law because this Court has not applied a different personal jurisdiction standard to out-of-state public officials—and Beard does not contend otherwise (nor could he).

Although Beard devotes nearly five pages of his petition to attempting to paint the First Circuit's opinion as conflicting with this Court's past decisions, Beard does not cite one case in which this Court (or any court) established a modified jurisdictional framework applicable only to state officials.[8] Far from promoting harmony, imposing a different standard for out-of-state officials would itself mark a fundamental change to personal jurisdiction jurisprudence. Beard offers no support for why such a sea change is warranted.

Beard also contends that the First Circuit's decision conflicts with this Court's reasoning in *Kulko v. Superior Court*, 436 U.S. 84 (1978). In *Kulko*, this Court held that jurisdiction over an out-

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[8] For example, Beard asserts that "[r]equiring a state official to defend against a claim in a foreign jurisdiction is a double imposition on the official's exercise of discretion." Pet. 15. Beard also contends that "[a] prisoner is, of course, entitled to bring suit against a state official for violation of constitutional rights, but the prisoner should not be entitled to do so in a jurisdiction where the official does not have, and never had, any physical presence." *Id.* The striking absence of legal support for Beard's sweeping "discretion" and "physical presence" propositions underscores the tenuous nature of his argument.

of-state individual—a divorced father, not a public official—was improper because he "did not purposefully derive benefit from any activities relating to the [forum state]." 436 U.S. at 96. This Court reasoned that the father "did no more than acquiesce in the stated preference of one of his children to live with her mother in California," and that this acquiescence can hardly be said to constitute purposeful availment of the benefits of the forum state's (*i.e.*, California's) laws. *Id.* at 94, 97. This Court further reasoned that "the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intention to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." *Id.* at 101.

Beard argues: "If the act of sending a child across state lines is not enough to support personal jurisdiction in the receiving State, it is difficult to see—and the Court of Appeals did not explain—why the act of sending a prisoner across state lines should be any different." Pet. 16. This superficial analysis fails to withstand even cursory analytical scrutiny.

The factual circumstances in *Kulko* differ markedly from those in the present case. The First Circuit recognized that Hannon alleges that Beard's purposeful, voluntary conduct actually created significant contacts with Massachusetts: "when Beard arranged for the transfer between the Pennsylvania DOC and the Massachusetts DOC pursuant to an existing, ongoing contract between the two, he 'caused extensive services to be rendered

in Massachusetts, caused payment to be made in Massachusetts, and procured the application of Massachusetts law to [ ] Hannon's future conduct.'" Pet. 9a-10a. The First Circuit's analysis also explicitly outlined the significant benefits Beard allegedly obtained as a result of transferring Hannon pursuant to the ICC. Indeed, the First Circuit concluded that personal jurisdiction was permissible in part because Hannon's factual allegations assert that "Beard benefited . . . by ridding himself of a troublemaker." Pet. App. 17a. This is hardly analogous to the passive acquiescence at issue in *Kulko*.

In sum, the First Circuit's decision rests on the careful application of settled personal jurisdiction principles and is entirely consistent with this Court's binding precedent. Any difference between the conclusion reached by the First Circuit and those of other Courts of Appeals is attributable to the application of those settled principles to the particular facts of this case. This Court should not revisit that fact-specific inquiry. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

## II. THIS COURT HAS REPEATEDLY AND RECENTLY DECLINED TO REVIEW THE JURISDICTIONAL ISSUE PRESENTED IN THIS CASE

This Court has repeatedly declined to review the issue of personal jurisdiction over out-of-state

public officials three times in the past three years, the most recent of which occurred last month:

- Question Presented in *Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008), *cert. denied*, --- S. Ct. --- (U.S. Oct. 20, 2008): "Whether the courts should apply a tort or 'doing business' analysis in determining whether a federal court's exercise of personal jurisdiction is proper when the claim is against a state official acting in his official capacity."

- Question Presented in *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), *cert. denied*, --- S. Ct. --- (U.S. Oct. 6, 2008): "Whether the same personal jurisdictional analysis should apply in a case against a non-resident public official as that applied in a case against a non-resident private litigant, or whether additional minimum contacts beyond those set forth in the state long-arm statute should be imposed where the defendant is a state official."

- Question Presented in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 379 (U.S. 2006): "Whether principles of due process and state sovereignty permit a court in one State to exercise personal jurisdiction over the Attorney General of another State in a suit brought to invalidate and enjoin

> enforcement of laws enacted and enforced entirely within the latter State."

The First Circuit's proper legal analysis, the unique, transfer-centric claims alleged in this case and the First Circuit's narrow, fact-driven holding offer no reason for this Court to conclude it ought to review the issue now.

## III. PETITIONER ACKNOWLEDGES THAT THERE IS NO DIRECT CONFLICT AMONG THE COURTS OF APPEALS

### A. The Courts Of Appeals Consistently Apply This Court's Personal Jurisdiction Legal Standard And Only Reach Different Results Due To Case-By-Case Analysis Of Relevant Facts

Beard unsuccessfully attempts to create a split in the Courts of Appeals where none exists. Indeed, Beard concedes in his petition that "canvassing appellate decisions involving jurisdiction over claims against out-of-state officials does not reveal a circuit split in the conventional sense." Pet. 16.

Despite this concession, Beard attempts to portray the First Circuit's decision as conflicting with decisions by the Seventh and Tenth Circuits in cases concerning personal jurisdiction over out-of-state corrections officials brought by transferred inmates. However, a careful reading of the cases Beard cites reveals that there are no differences among the circuits on matters of law. Rather, any difference in

the outcomes of those cases is attributable to the distinct factual circumstances of each case.

In his effort to create a conflict among the Courts of Appeals, Beard relies heavily on *Kinslow v. Pullara*, 538 F.3d 687 (7th Cir. 2008), and *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), but both the Seventh and Tenth Circuits stated and applied the identical personal jurisdiction standard as the First Circuit. *See Kinslow*, 538 F.3d at 690-93; *Trujillo*, 465 F.3d at 1217-23; Pet. App. 6a-21a.

First, contrary to Beard's contention, *Kinslow* only further demonstrates the absence of a split among the Courts of Appeals. In *Kinslow*, the defendant, a New Mexico inmate, was housed in Illinois pursuant to the ICC. 538 F.3d at 688-89. The inmate was subsequently transferred back to New Mexico from Illinois and suffered severe medical issues during the transfer. *Id.* The inmate filed suit in Illinois against, among others, New Mexico prison officials seeking redress for his inadequate medical care. *Id.* In conducting its analysis, the Seventh Circuit clearly stated the proper test for personal jurisdiction as articulated by this Court, but concluded that personal jurisdiction in Illinois was not proper as a result of the inmate's "failure throughout this litigation to look at each separate person's contacts with Illinois." *Id.* at 692-93. In short, *Kinslow* stated and applied the appropriate legal standard, but (here again) the absence of specific factual allegations as to each individual defendant prohibited an assertion of personal jurisdiction.

Beard erroneously asserts two reasons why he believes *Kinslow* "contrasts with the decision of the Court of Appeals": (1) *Kinslow* did not view the ICC between the two states as "an adequate predicate for finding that the named . . . defendants had the requisite contacts" and (2) the *Kinslow* court "refused to assume" that any of the defendants had sufficient contacts to support personal jurisdiction. Pet. 17 (emphasis omitted). The First Circuit in this case did not hold that the ICC, by itself, was an adequate predicate supporting an assertion of jurisdiction. The First Circuit also did not "assume" that Beard had sufficient contacts to support personal jurisdiction—it relied upon Hannon's specific, concrete, particularized factual allegations that Beard ordered Hannon's interstate transfer. Pet. App. 4a-5a.

Second, *Trujillo* likewise demonstrates the absence of a split among the Courts of Appeals and illustrates the narrow nature of the First Circuit's holding in this case. 465 F.3d at 1217-22. In *Trujillo*, the Tenth Circuit held that a New Mexico inmate transferred to Virginia pursuant to the ICC failed to allege sufficient facts to justify an assertion of jurisdiction over Virginia corrections officials in New Mexico. In conducting its analysis, the Tenth Circuit clearly stated the proper test for personal jurisdiction as articulated by this Court, but following a fact-specific inquiry concluded that personal jurisdiction in New Mexico was not proper because of the Virginia officials' passive *receipt* of the inmate and because "the only contacts . . . with New Mexico are that [the Virginia officials] received a transferred New Mexico prisoner and implemented New Mexico's

classification and work authorization policies pursuant to the ICC." *Id.* at 1219 (emphasis added).

Here again, Beard suggests the existence of a circuit split where none exists. Beard asserts that the Tenth Circuit (1) "differentiated between implementing an ICC transfer order and actually having sufficient contacts with a foreign state to justify the assertion of jurisdiction" and (2) was not "trouble[d]" by the "prospect of the prisoner having to proceed in two different forums." Pet. 17-18. The First Circuit in this case was not presented with a low-level defendant who merely "implement[ed]" an ICC order; the facts of this case involve specific allegations that the senior-most official in the Pennsylvania Department of Corrections personally directed his subordinates to transfer Hannon out of Pennsylvania and, consequently, purposefully created contacts with Massachusetts. Pet. App. 9a-10a. Those two factual settings are fundamentally different. The First Circuit also emphasized that this case had been pending in Massachusetts for a number of years (Trujillo's case was dismissed after only three months) and that Hannon was represented by court-appointed counsel in Massachusetts (Trujillo was proceeding *pro se* and did not have the benefit of appointed counsel). Pet. App. 20a; *Trujillo*, 465 F.3d at 1213. Those two factual settings are likewise fundamentally different.[9]

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[9] In addition to further evincing the fact-dependent nature of the jurisdictional analysis, *Trujillo* also illustrates the First Circuit's narrow holding in this case. Unlike the transfer-related claims Hannon asserts in the present case, *Trujillo* involved a claim relating to the inmate's conditions of

In sum, despite Beard's assertion to the contrary, the First Circuit's decision in this case is in harmony with the decisions of other Courts of Appeals because all of those courts applied the same established legal standard to the disparate factual situations before those courts. It is the varying factual settings—not variations in the legal standard applied—that account for the different jurisdictional outcomes. *See Burger King*, 471 U.S. at 485-86 (explaining that there are no "talismanic jurisdictional formulas" and "'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice'" (citing *Kulko*, 436 U.S. at 92 (1978))).

### B. There Is No Inherent Conflict Among The Courts Of Appeals On The Broader Issue Of Personal Jurisdiction Over Out-Of-State Officials

Unable to identify a direct conflict among the Courts of Appeals, Beard and *amici* states attempt to conflate the narrow issue the First Circuit addressed (jurisdiction over an out-of-state corrections official where the inmate's claim directly relates to the inmate's transfer) with the significantly broader issue of personal jurisdiction over any out-of-state official. Pet. i, 18-21; Br. of *amici* states 15-17.

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confinement in the receiving state—a category of claims expressly excluded from the First Circuit's holding. *See* Pet. App. 15a-16a (holding that "[t]his case turns on the unique factual situation wherein the harm alleged was directly tied to the contacts establishing personal jurisdiction").

The arguments on this broader issue were before this Court less than two months ago and was calendared for consideration at its September 29, 2008 conference. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), *cert. denied*, --- S. Ct. --- (U.S. Oct. 6, 2008). At that time, this Court declined to review the issue of personal jurisdiction over out-of-state officials. *Id.*

The petitioners in *Wercinski* sought review, in part, on the question of whether "the same personal jurisdictional analysis should apply in a case against a non-resident public official as that applied in a case against a non-resident private litigant." Pet. i, *Wercinski*, (No. 07-1387) (U.S. May 5, 2008). Although the *Wercinski* petition similarly argued that there was a conflict among several Circuit Courts of Appeals, *see id.* at 11-21, the respondents in that matter likewise explained that any differences in those cases were attributable to *factual* differences, not any conflict in the applicable legal standard. Br. of Opp. 3-14, *Wercinski* (No. 07-1387) (U.S. July 7, 2008).

Hannon will not restate the arguments so recently considered by this Court.[10] Instead, Hannon

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[10] The *Wercinski* petition analyzed several authorities Beard cites in his petition. *See Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001); *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998); *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995); *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992); *Taylor v. Phelan*, 912 F.2d 429 (10th Cir. 1990); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978); *Dial-Up Servs., Inc. v. Oregon*, No. 07-00423-PHX-EHC, 2007 WL 4200756 (D. Ariz. Nov. 27,

simply notes that the First Circuit applied the same legal standard as the Fifth Circuit in *Wercinski* in its consideration of state sovereignty interests: the common interest of the states standard mandated by this Court's binding precedent. *Asahi*, 480 U.S. at 113 (holding that a court must weigh "the shared interest of the several States"); *Wercinski*, 513 F.3d at 488 (weighing the "shared interest of the several states"); Pet. App. 20a (weighing the "interests of all sovereigns").[11]

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2007); *Overby v. Johnson*, 418 F. Supp. 471 (E.D. Mich. 1976); *Maney v. Ratcliff*, 399 F. Supp. 760 (E.D. Wis. 1975).

In his petition, Beard relies on two additional cases that were not discussed in the *Wercinski* materials. First, in *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487-89 (4th Cir. 1985), the Fourth Circuit explicitly denied jurisdiction based on the state's long-arm statute and did not engage in any constitutional due process analysis. This limited legal reasoning devoid of constitutional analysis could not have given rise to a conflict on the constitutional limits of personal jurisdiction over out-of-state officials. Second, in *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1343-44 (Fed. Cir. 2006), the Federal Circuit held that a Missouri court could not exercise personal jurisdiction over University of Arkansas officials because the operative complaint failed to allege sufficient contacts. The Federal Circuit stated that the complaint mentioned "Missouri" only once—and that single reference was in relation to a corporation that was no longer a party to the case. *Id.* at 1344 This basic pleading deficiency likewise could not be a course of conflict on the constitutional limits of personal jurisdiction over out-of-state officials. Accordingly, the legal analyses in both *Roanoke River Basin Ass'n* and *Pennington Seed* are of no help to Beard.

[11] The First Circuit's opinion is also entirely consistent with the Fifth Circuit's reasoning (and result) in *Wercinski*. Indeed, the First Circuit succinctly explained why Beard's reliance on Wercinski is inapposite:

Put simply, Beard and *amici* states offer no new evidence of a circuit conflict beyond the arguments advanced in the *Wercinski* petition, nor do they articulate a compelling new reason why the First Circuit's resolution of the significantly more circumscribed issue raised in the present matter warrants this Court's review.

## IV. THE JURISDICTIONAL ISSUE PRESENTED IN THIS CASE IS NOT RIPE FOR THIS COURT'S REVIEW

### A. The First Circuit's Limited, Fact-Specific Holding Does Not Alter Existing Precedent Restricting Most Suits Against Out-Of-State Corrections Officials

Beard's and *amici* states' contention that the First Circuit's opinion will open the floodgates to meritless inmate lawsuits is grossly speculative and significantly undermined by the empirical material *amici* states appended to their brief. Indeed, the information presented by the *amici* states reflects that in the past five years federal courts have handled only ten cases, including this case, involving

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> [Wercinski] was filed in Texas and involved a challenge to an Arizona government official's endorsement of Arizona law in Arizona; the action attacked the validity of that law. By contrast, Hannon does not challenge the laws that permit a transfer, but rather alleges that Beard initiated the transfer in retaliation for and in order to hinder Hannon's exercise of constitutional rights.

Pet. App. 10a.

transferred inmates that sued out-of-state officials—an average of *two cases per year* out of the approximately 24,500 civil rights cases filed by inmates annually. Br. of *amici* states at Table A; Tracey Kyckelhahn & Thomas H. Cohen, Bureau of Justice Statistics, NCJ 222989, *Civil Rights Complaints in U.S. District Courts, 1990-2006* (2008), *available at* http://www.ojp.usdoj.gov/bjs/abstract/crcusdc06.htm.

Even within this discrete subset of cases, the First Circuit's holding will likely have a limited impact because of its explicitly narrow, transfer-related nature. Beard concedes in his petition (as he must) that the "Court of Appeals acknowledged concerns that its holding would subject prison officials across the country to lawsuits in every State that is a party to the ICC, but thought that its decision 'ought not have this [effect].'" Pet. 7. The First Circuit went to great lengths to emphasize that its holding does not apply to other claims from transferred inmates, such as those for pre- and post-transfer grievances:

> This case turns on the unique factual situation wherein the harm alleged was directly tied to the contacts establishing personal jurisdiction. It is not a free ticket for personal jurisdiction in receiving states over any prison officials who are parties to the Compact . . . . In short, our opinion gives no assistance for a transferred prisoner to assert a claim in the transferee court against the transferor [Pennsylvania officials] based on pre-transfer grievances.

Pet. App. 16a.

The First Circuit's opinion is far from a sweeping invitation for courts to routinely exercise jurisdiction over out-of-state officials. Hannon's claims arise out of Beard's alleged deliberate misconduct in using the ICC and its transfer procedures to silence or obstruct a "vexatious" prisoner's exercise of his constitutional rights. In furtherance of this unconstitutional activity, Beard purposefully and voluntarily created systemic, mutual and ongoing contacts with Massachusetts. It is precisely this "relatedness" of Hannon's claims to Beard's contacts that renders jurisdiction over Beard proper in Massachusetts for the transfer-related claims at issue in this case, while conversely negating the potential for expansive jurisdiction over prison officials in other cases for routine complaints related to general conditions of confinement or other alleged misconduct in the transferee forum. Accordingly, until there is real evidence of significant increases in claims against out-of-state prison officials from transferred inmates, review by this Court would appear to be imprudent and premature.

The First Circuit's opinion in this case is one of first impression on the precise issue of whether a court may exercise personal jurisdiction over an out-of-state corrections official where the inmate's claim arose out of and relates to the transfer itself. *See* Pet. App. 11a (recognizing that "Beard cites no case that suggests that prison officials cannot be subject to personal jurisdiction in a foreign state merely because they are state officials"). No direct circuit conflict has developed on this issue, and there is no reason to believe that other circuits faced with similar facts would not reach the same result. The

absence of considerable lower court precedent suggests that this issue may benefit from additional time and further percolation. *See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (recognizing that "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court"). In sum, given that there is no direct conflict on a matter of law, it is prudent to permit the lower federal courts to "serve as laboratories in which the issue receives further study" prior to review in this Court. *See McCray v. New York*, 461 U.S. 961, 962-63 (1983).

### B. The First Circuit's Narrow Holding Does Not Threaten To Disrupt Other Interstate Agreements As *Amici* Apprehend

*Amici* states attempt to inflate the importance of the First Circuit's narrow holding by arguing that this decision may encourage lawsuits involving other interstate compacts and business agreements. Br. of *amici* states 4-14. This argument is entirely speculative, and review on these grounds is premature.

The muted response to the Second Circuit's opinion three years ago in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 379 (U.S. 2006), demonstrates the limited reach of such a holding. In *Pryor*, the Second Circuit held that a New York court could exercise specific personal jurisdiction over 46

out-of-state officials who participated in meetings in New York to draft a nationwide tobacco settlement agreement. *Pryor*, F.3d at 165-68. Like the First Circuit in this case, the Second Circuit stated the long-established personal jurisdiction test and applied that standard to the specific facts before it. *Id.* at 167-68 ("It is a rare event for the representatives of various sovereign states to assemble purposefully in New York to attempt to jointly settle related lawsuits and to agree to then pass individual state statutes. But because that is what took place, New York is the proper forum for this lawsuit."). This Court declined to review *Pryor*, and since then no federal courts have expanded on *Pryor's* narrow holding to apply it to cases involving other interstate agreements.

In short, federal courts continue to apply established personal jurisdiction analyses notwithstanding the Second Circuit's decision in *Pryor* (and have not extended *Pryor's* reasoning beyond its fact-specific holding). There has been no dramatic shift in personal jurisdiction jurisprudence or a tidal wave of lawsuits over out-of-state officials based on *Pryor*. Consequently, there is no reason to expect that federal courts will read the First Circuit's narrow language in this case as an invitation to significantly broaden the personal jurisdiction analysis or the availability of personal jurisdiction over out-of-state officials.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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No. 08-326

# In the Supreme Court of the United States

JEFFREY BEARD,
*Petitioner*

*v.*

FRANCIS HANNON,
*Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Secretary of the Pennsylvania Department of Corrections, seeks review of a ruling by the Court of Appeals for the First Circuit, allowing him to be sued in Massachusetts for a single discretionary decision he made in Pennsylvania, pursuant to his official duties, about Respondent, a Pennsylvania inmate who was in Pennsylvania at the time. Review is warranted because, by their very nature, long-arm cases against state officials raise sovereignty and federalism concerns that are not present in cases against private parties.

All of Respondent's arguments in his Brief in Opposition to the petition ("Br. in Opp.") are based on the same premise: his particular transfer-related claim is "unique" (*See* Br. in Opp. at 1, 9, 10, 15, 19, 23) and the decision of the Court of Appeals is "narrow" (*See id.* at iv, 1, 9, 15, 17, 18, 19, 23, 25, 26). But what makes this case important is not the underlying details; it is that the Court of Appeals barely noticed Petitioner's status as a state official, and ultimately ascribed no significance to it. The court treated this case like any other – contrary to principles that underlie past decisions of this Court and contrary to the decision-making of other Courts of Appeals that have dealt with long-arm claims against foreign state officials. The implications of the Court of Appeals' decision are far-reaching no matter how limited in scope Respondent's own individual claim against Petitioner may be.

## I. This Case Presents An Important And Recurring Issue.

Broadly stated, this case is about how the "minimum contacts" test first articulated in *International Shoe Co. v. Washington*, 326 U.S. 310,

316 (1945) (and refined in subsequent cases) should be applied to a defendant who is a state official from outside the forum state, not a private party or a commercial entity. Respondent insists that his retaliation challenge to his transfer pursuant to the Interstate Corrections Compact (ICC) is unique and that, for that reason, there is nothing noteworthy about the Court of Appeals' fact-driven decision upholding personal jurisdiction – just this once – over the official who made (but did not himself implement) the transfer decision. Respondent, however, can neither obliterate the jurisdictional issue presented here nor transform it into something inconsequential, just by portraying his individual case as unique.

Resolution of personal jurisdiction issues has to be contextual. As the Court observed in *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978), the due process minimum contacts test "is not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-486 & n.29 (1985). Thus, for a personal jurisdiction determination to be fact-specific is the norm. But for present purposes that is beside the point. Following Respondent's argument to its logical conclusion would mean that no personal jurisdiction issue would ever reach the Court.

At any level, the facts must be weighed and analyzed under existing legal rules. And rules evolve. They are subject to fine-tuning when circumstances warrant – as in this case. This is a vehicle by which the Court can clarify how personal jurisdiction principles should apply in long-arm cases against state officials in particular. Respondent's individual case presents that question squarely. The question is

important to states generally, as *amici* – including Massachusetts, the state whose interests the Court of Appeals claimed to be safeguarding, *see* Pet. App. 19a – attest, not only to Petitioner as an individual litigant.

Respondent points to the recent denial of certiorari in three cases that presented similar questions as confirmation that the issue in this petition is unimportant (Br. in Opp. at 13-15). Actually, the fact that three petitions raising related personal jurisdiction issues have been filed in the past two years cuts the other way. How the lower courts should determine whether a state official can constitutionally be sued in a foreign state is an issue that has arisen repeatedly and is bound to arise again. Guidance is needed.

And this case is important because of the implications of the Court of Appeals' decision for cases yet to come, both those involving claims of inmates transferred under the ICC and those arising out of entirely different types of interstate cooperation. Respondent's contention that the decision poses no risk of an upsurge in ICC-related litigation against state officials in foreign states (*see* Br. in Opp., at 22-25) is naïve. Under the Court of Appeals' approach, more long-arm cases, with all the burdens they entail, are inevitable, given prisoners' propensity to file lawsuits, *Cf. Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (recognizing earlier "sharp rise in prisoner litigation"), and given the sheer number of inmates potentially subject to transfer from one jurisdiction to another (*see* Petition, at 2, 10-11).[1]

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[1] Respondent's reliance on *amici's* Table A to suggest that inmates hardly ever sue out-of-state officials is based on a [continued ... ]

As for the likelihood that the decision of the Court of Appeals will encourage long-arm lawsuits based on other types of cooperative interstate activity, Respondent's only answer seems to be that, so far, there have not been any other cases like *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 379 (2d Cir. 2005), *cert. denied*, 127 S.Ct. 379 (2006) (*See* Br. in Opp., at 25-26). Respondent's silence about the numerous interstate compacts *amici* have brought to the Court's attention (Brief of *amici*, at 4-12) is deafening. These compacts, which differ markedly from the MSA at issue in *Pryor*, require state officials to reach into other states on a daily basis (and, in so doing, subject themselves to possible litigation). If the Court of Appeals' personal jurisdiction analysis is accepted elsewhere, state officials will have to defend themselves on compact-based claims in foreign jurisdictions on a routine basis. For states, that is an intolerable prospect, and it is legally unsound.

## II. The Decision Of The Court Of Appeals Is At Odds With Decisions Of This Court.

Petitioner's argument for review by the Court rests on the premise that government is not commerce, and suits against state defendants differ from suits against non-state parties. Indeed, cases against States and state officials are subject to well-established limitations that have no applicability in other civil matters. Most notably, the Eleventh

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misunderstanding of that table (and the related text, Brief of *amici*, at 3-4). *Amici*'s point was to show that there has *already* been an increase in litigation by ICC-transferred inmates, not to list every such case.

Amendment "serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (internal quotation marks and citation omitted). In their official capacities, state officials can only be sued for prospective injunctive relief, not for damages. *E.g., Kentucky v. Graham*, 473 U.S. 159, 165-167 (1985); *Ex Parte Young*, 209 U.S. 123 (1908). Even when sued in their individual capacities for damages, state officials may be entitled to immunity, *see, e.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Malley v. Briggs*, 475 U.S. 335 (1986), a privilege not shared by private parties, *see Richardson v. McKnight*, 521 U.S. 399, 407-412 (1997).[2] To suggest that the personal jurisdiction calculus may be somewhat different in a case against a state official than it is in a case against a private party is thus neither novel nor untoward.

Respondent dismisses the very idea that there might be a "modified jurisdictional framework" for cases against state officials because the Court has never so held (Br. in Opp. at 11). But the fact that the Court has not resolved this important and recurring issue counsels in favor of review, not against it.

At the same time, Petitioner submits, the Court's existing personal jurisdiction jurisprudence – on sovereignty and federalism, and on the relevance of the "quality and nature" of a defendant's activity – does point in the direction Petitioner urges the Court to go now. *See* Petition, at 12-16. Granting this petition will enable the Court to make explicit what, in Petitioner's view, current caselaw already

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[2] Respondent seeks both damages and injunctive relief in this litigation. *See* Br. in Opp. at 5.

telegraphs (although the Court of Appeals did not agree): modifying the personal jurisdiction inquiry in long-arm cases against state officials is constitutionally justified.

The Court's past personal jurisdiction decisions all involved private parties, and most of them involved traditional tort and contract litigation. Regardless of what facts and "affiliating circumstances" existed in those cases and how they were analyzed, *see Kulko*, 436 U.S. at 92, the notion that the cases allow for state officials to be haled into courts around the county as though they were ordinary commercial litigants is untenable. Such a regime would impose unwarranted extra costs on the provision of state services and would impinge on the sovereignty of states (through their court systems) to police the conduct of their respective officers. Furthermore, as already discussed, interpreting the law in that manner would discourage interstate cooperation in the corrections arena and in other spheres, to the detriment of those concerned and the public as a whole.

On the other hand, analyzing personal jurisdiction slightly differently when state officials are sued in foreign states, to cut back the circumstances under which officials may have to appear and defend themselves outside their home states, would foster predictability for state officials. That, in turn, is what the Due Process Clause calls for: It "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In addition to his general attack on Petitioner's legal theory, Respondent discounts the significance of this Court's *Kulko* decision (Br. in Opp., at 11-13). But *Kulko* is important, and the Court of Appeals' approach conflicts with *Kulko*, in at least three ways.

First, *Kulko*'s focus on the relevance, for personal jurisdictional purposes, of the "quality and nature" of a defendant's activities, *id.* 436 U.S. at 92, supports giving affirmative consideration to a state official's governmental role and the non-commercial nature of what such an official ordinarily does. *See also id.* at 97. Instead of focusing on the qualitative differences between private business and governmental activities, however, the Court of Appeals disregarded them. *See* Pet. App. 10a, 19a.

Second, notwithstanding Respondent's effort to downplay them (*see* Br. in Opp. at 12-13), the parallels between *Kulko* and this case are real, yet the outcomes are opposite. Both *Kulko* and this case concerned a "single act" by the defendant in the defendant's own state. *Id.* at 97. While Mr. Kulko did not initiate his daughter's move to California, he actively facilitated it, *e.g.*, by buying her ticket, *id.* at 87 (and must have anticipated further contact with her after the move); Petitioner did make the decision to "move" Respondent (though he did not carry out the decision himself and would not himself have further contact with Respondent or anyone else in Massachusetts). Mr. Kulko benefited from his daughter's move (his immediate expenses decreased, overall family harmony was fostered, and he could rest assured that his daughter would receive necessary services, such as education and police protection, in California), *see id.* at 94; similarly, Petitioner benefited from Respondent's transfer, *see* Pet. App. 17a. But in *Kulko*, unlike this case, the

Court recognized that, notwithstanding any benefit Mr. Kulko realized, it did not justify subjecting him to the burden and strain of litigating a subsequent dispute in a distant state. *Id.* at 97. Though California retained "substantial interests" in the well-being of its minor residents, that was not controlling for jurisdictional purposes. *See id.* at 98. By the same token, whatever interest Massachusetts has in protecting the rights of those housed in its prisons, *see* Pet. App. 19a, it should not have affected the Court of Appeals' decision here.

And third, the Court made clear in *Kulko* that one must not "confuse[] the question of [a party's] liability with that of the proper forum in which to determine that liability." *Id.* at 96. Here, in contrast, the Court of Appeals justified the assertion of personal jurisdiction over Petitioner in part by assuming that he acted improperly. *See* Pet. App. 17a, 19a.

## III. The Decision of the Court Of Appeals Cannot Be Reconciled With Those Of Other Circuits.

A commercial defendant's lack of physical presence in the forum State does not automatically defeat personal jurisdiction there. *Burger King*, 471 U.S. at 476. This stems from the nature of "modern commercial life." *Ibid.* The nature of state officials' work is different. Cases against state officials therefore should be, and are, different. Except for the decision in this case, no Court of Appeals has upheld long-arm jurisdiction over a foreign state official, in any kind of case, unless the defendant official traveled to the forum state for case-related reasons. *See*

Petition, at 16-21. Respondent cannot and does not say otherwise.[3]

Respondent of course tries to minimize the divergence between the decision here and the decisions in other long-arm cases involving state officials (Br. in Opp. at 15-22). Incidental factual differences between one prisoner case and another cannot explain why, until now, not one transferred prisoner in the country has been allowed to sue home state prison officials in another state, on any theory. *See* Pet. App. 15a.[4]

If the legal standards applicable in cases against state officials were as clear and well understood as Respondent suggests, the Court of Appeals' "relatedness" rationale for allowing Respondent's supposedly unique claim against Petitioner to go forward, *see* Pet. App. 15a-16a, should also have been dispositive in *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir.), *cert. denied*, 129 S.Ct. 63 (2008),

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[3] Even if long-arm jurisdiction over a state official who never set foot in the forum state might be appropriate in some extraordinary, yet-to-arise situation, there was no basis to so find here.

[4] In trying to distinguish *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), Respondent points to the Court of Appeals' observation, Pet. App. 20a, that Massachusetts counsel was appointed for him well after suit was filed, and this action had been pending much longer than *Trujillo* before the district court addressed personal jurisdiction (Br. in Opp. at 18). But a distinction based on such post-suit developments, which Petitioner could not have foreseen or taken into account, is contrary to this court's precedents. *See World-Wide Volkswagen*, 444 U.S. at 297; *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (court does not acquire personal jurisdiction "by being the 'center of gravity' of the controversy, or the most convenient location for the litigation").

but it was not. *Id.* at 487. Unlike the First Circuit, the Fifth Circuit gives due weight to the sovereignty and federalism concerns that ought to limit the assertion of personal jurisdiction over foreign state officials. *See also Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008), *cert. denied*, ---S.Ct.--- (U.S. Oct. 20, 2008); *Burstein v. State Bar of California*, 693 F.2d 511, 522 (5th Cir. 1982).

* * * * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

JEFFREY BEARD,

*Petitioner*,

v.

FRANCIS HANNON,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

**BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION**

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## QUESTION PRESENTED

May a state official be sued in another state, consistent with principles of due process and state sovereignty, for a single decision made in the official's home state and pursuant to the official's duties?

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## INTEREST OF THE *AMICI* STATES

The *amici* states have an obvious and profound interest in protecting their officials from having to defend, in their personal or official capacities, lawsuits challenging official actions filed in courts located in other states. The unfettered exercise of longarm personal jurisdiction when claims are predicated on the conduct of official state duties not only increases the expense of litigation for states and officials, but also threatens core structural protections of the states as sovereigns. Even if sovereign immunity does not categorically block foreign-state lawsuits against unconsenting states or their officials, *see Nevada v. Hall*, 440 U.S. 410 (1979), principles of sovereignty and federalism ought nonetheless to limit longarm personal jurisdiction in personal and official capacity suits arising from affairs of state.

The circumstances of this case arise from the cooperation of two states pursuant to an interstate compact and underscore why defendant-state sovereignty ought to matter to personal jurisdiction, or at least why the Court needs to clarify its relevance. In the decision below, the First Circuit presumed that exercising personal jurisdiction would vindicate the interests of the forum state—Massachusetts—in adjudicating disputes involving its residents. Yet the transfer giving rise to the case occurred only because Massachusetts agreed to accept respondent Francis Hannon as a prisoner, so it is hard to see how its interests are served by an in-state lawsuit challenging the legitimacy of the transfer. Indeed, by joining this brief the Attorney

General of Massachusetts wishes to convey that it is the smooth functioning of the Interstate Corrections Compact, not in-state adjudication of lawsuits by transferred prisoners, that best vindicates the interests of the citizens of Massachusetts.

Regardless, the Court should take this case to clarify whether, how, and to what extent courts should consider sovereignty and federalism when evaluating longarm personal jurisdiction over foreign-state officials.[1]

## REASONS FOR GRANTING THE PETITION

### I. Lawsuits Against Officials of One State in Courts of Other States Constitute an Important and Growing Phenomenon

#### A. Prisoner transfer lawsuits are a significant part of this increasingly important trend

Interstate prisoner transfers are common. A 2005 U.S. Department of Justice study of 43 states that engage in state-to-state inmate transfers found at least 4,900 transferees, nearly 75% of whom had been transferred pursuant to interstate compacts. U.S. Dep't of Justice, Nat'l Inst. of Corrections,

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* states' intention to file this brief. Counsel for the Petitioner received notice more than 10 days prior to the due date of this brief and counsel for the Respondent received notice on October 6, 2008. On October 7, 2008, Respondent filed and this Court granted a request for a 30-day extension of time, up to and including November 7, 2008, in which to file a brief in opposition to the Petition for Certiorari.

*Interstate Transfer of Prison Inmates in the United States: Special Issues in Corrections* 2, 12 (Feb. 2006). Relatedly, in recent years there has been a remarkable rise in longarm actions against state officials arising out of inmate transfers. The amici states have been able to document twenty-three such cases going back 19 years with over 80 percent arising since 2000. *See* Table A.

As a result, in recent years personal jurisdiction issues in prisoner transfer cases have maintained a steady presence in courts across the country. *See Kinslow v. Pullara*, 538 F.3d 687 (7th Cir. 2008) (inmate sued New Mexico officials in Illinois over transfer resulting in medical complications; personal jurisdiction denied); *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006) (inmate transferred from New Mexico to Virginia sued Virginia prison officials in New Mexico; personal jurisdiction denied); *Jones v. Rowley*, No. 08-3207-SAC, 2008 WL 4329984 (D. Kan. Sept. 16, 2008) (inmate transferred from Maryland to Kansas sued Maryland prison officials in Kansas; personal jurisdiction denied); *Howell v. Winchester*, No. CIV-07-1443-M, 2008 WL 700954 (W.D. Okla. Mar. 13, 2008) (inmate transferred from Illinois to Oklahoma sued Illinois prison officials in Oklahoma; personal jurisdiction denied); *Bowcut v. Idaho State Bd. of Correction*, No. CV-06-208-S-BLW, 2007 WL 1674028 (D. Idaho Jun. 5, 2007) (inmate transferred from Idaho to Texas sued Texas warden in Idaho; personal jurisdiction denied); *Rivera v. Armstrong*, No. 3:03CV1314(DJS)(TPS), 2007 WL 683948 (D. Conn. Mar. 2, 2007) (inmate transferred from Connecticut to Virginia and back sued Virginia prison officials in Connecticut; personal jurisdiction denied); *Sadler v. Rowland*, No.

3:01CV1786(CFD)(WIG), 2004 WL 2061127 (D. Conn. Sept. 13, 2004) (inmate transferred from Connecticut to Virginia then back to Connecticut sued Virginia prison officials in Connecticut; personal jurisdiction denied).

This trend, combined with the reasoning and holding of the decision below, has significant implications for prison management. As prison officials encounter greater potential for facing longarm jurisdiction lawsuits, they may be less likely to transfer prisoners to ease overcrowding or otherwise promote prisoner and institutional safety. The Court should step in now to clarify whether and to what extent principles of sovereignty and federalism limit the ability of prisoners to hale officials into court for actions taken in another state that have an impact in the forum state.

### B. The decision below could encourage longarm lawsuits based on cooperative activity under several interstate compacts and uniform acts

If a court in one state may establish personal jurisdiction over an official of another state based on actions taken pursuant to an interstate compact, the effects could be far-reaching. Officials frequently take action pursuant to a variety of interstate compacts and uniform acts that have impacts in other states. Under the First Circuit's rule, such officials would subject themselves to the longarm jurisdiction of other states on a routine basis. The uniform acts and compacts discussed below offer the most easily imaginable scenarios for longarm lawsuits against state officials.

**Acts and Compacts Concerning Extradition and Rendition**

Nearly all States have entered into or enacted multiple agreements and uniform statues designed to facilitate extradition of individuals wanted for criminal prosecution or needed as witnesses. These include not only the Uniform Criminal Extradition Act, but also the Interstate Agreement on Detainers (used for interstate transfer of prisoners to be tried on charges in other jurisdictions), the Uniform Act for the Rendition of Prisoners as Witnesses in Criminal Proceedings, the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases, and the Uniform Interstate Family Support Act and its predecessor, the Uniform Reciprocal Enforcement of Support Act (providing for extradition of individuals accused of failing to pay child support).

Actions by state officials pursuant to these acts and agreements sometimes give rise to civil rights actions by prisoners and other affected individuals. *See, e.g., Ricks v. Sumner*, 647 F.2d 76 (9th Cir. 1981) (civil rights case arising from extradition); *Chapman* v. *Guessford*, 924 F. Supp. 30 (D. Del. 1996) (civil rights case arising from detainer); *Crenshaw v. Checchia* 668 F. Supp. 443 (E.D. Pa. 1987) (civil rights case arising from extradition). Such lawsuits, in turn, can precipitate personal jurisdiction issues. *See Steelman v. Carper*, 124 F. Supp. 2d 219 (D. Del. 2000) (arrestee extradited from New Mexico to Delaware sued New Mexico officials in Delaware; personal jurisdiction rejected); *see also Crenshaw*, 668 F. Supp. at 445 (declining permissive

joinder of transferring-state officials because of doubts about personal jurisdiction). The reasoning of the decision below would likely permit the exercise of personal jurisdiction in such longarm cases, rendering untold numbers of routine state government actions arising from extradition and rendition subject to lawsuits in other states.

**Interstate Compact on Juveniles**

The Interstate Compact on Juveniles—signed by all fifty states, the District of Columbia, the Virgin Islands, and Guam—regulates the movement across state lines of juveniles who are under court supervision.[2] Christopher Holloway, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *OJJDP Fact Sheet: Interstate Compact on Juveniles* 1 (Sept. 2000). This compact provides for the monitoring or return of any juvenile who: (1) has run away from home; (2) is placed on probation or parole and wants to reside in another state; (3) has absconded from probation or parole or escaped from an institution and is located in another state; (4) requires institutional care or specialized services in another state; or (5) has a pending court proceeding and runs away to another state. *Id.*

The rule set forth by the decision below could give juveniles the same ability to file "retaliatory transfer" and other suits against officials responsible

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[2] A newer version of the compact, called the Interstate Compact *for* Juveniles, has been adopted in 35 states. Council of State Governments, *Interstate Compact for Juveniles*, http://www.csg.org/programs/ncic/InterstateCompactforJuveniles.aspx (last visited Oct. 7, 2008).

for transferring them in the courts of the transferee state. This could apply to juveniles who are convicted of crimes as well as juveniles who have run away from home. The compact is used in an estimated 20,000 to 30,000 cases each year. John Mountjoy, *The Interstate Compact for Juveniles: Promoting Positive Outcomes for Youth* 11 (Apr. 2006). Accordingly, a vast number of official actions may be affected by whatever personal jurisdiction rule prevails.

**Mentally Disordered Offenders Compact**

Eight states have endorsed the Mentally Disordered Offenders Compact, which authorizes interstate agreements to provide services and facilities for the care and treatment of mentally disordered offenders. Council of State Governments, *Public Safety & Justice: Interstate Compacts*, http://www.csg.org/policy/pubsafety/compacts.aspx (last visited Oct. 7, 2008). The Compact allows each party state to make contracts with any other party state for the care and treatment of mentally disordered offenders in state institutions. *See* N.M. Stat. § 31-5-10 (Interstate Compact on Mentally Disordered Offenders, as codified by New Mexico, one of the participating states). It also provides for agreements concerning the participation of mentally disordered offenders in aftercare or conditional release programs administered by the receiving state. *See id.* Offenders have no say in whether or not they are transferred; judicial or administrative authorities determine whether the care and treatment of offenders would be more appropriate in the facilities of another state. *See id.*

Transfers and other actions under this interstate compact could conceivably give rise to longarm lawsuits comparable to this case. Under the reasoning of the decision below, mentally disturbed offenders or their guardians would be in a position to sue (for alleged retaliation or other theories) the government officials who transferred them in the courts of a transferee state.

**Interstate Compact For Adult Offender Supervision**

All fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have signed the Interstate Compact For Adult Offender Supervision, which regulates the movement between states of freed offenders who remain under correctional supervision. Interstate Comm'n for Adult Offender Supervision, *Directory: Regions/States*, http://www.Interstatecompact.org/Directory/RegionsStates/tabid/77/Default.aspx (last visited Oct. 7, 2008). It is designed to protect public safety and to create a more effective and efficient means of transferring and tracking offenders between states. Interstate Comm'n for Adult Offender Supervision, *2008 ICAOS Rules* 1 (2007).

To be eligible for an interstate travel permit under the compact, offenders must meet specific criteria, including having "a valid plan of supervision" and being "in substantial compliance with the terms of supervision in the sending state[.]" *Id.* at 22. The sending state investigates the offender's criminal background, the reasons why the offender seeks transfer, whether the offender is subject to sex offender registry requirements, and

generally whether the offender meets the requirements of the compact, and then relays that information to the receiving state. *Id.* at 33-34. If the parolee is eligible for transfer, the degree of interaction between officials in a receiving state and a sending state is similar to that of the Interstate Corrections Compact. The sending state determines the duration of supervision in the receiving state, and may apply certain conditions on the parolee. *Id.* at 39-40. In addition, a sending state retains the power to retake a parolee and bring him or her back to the sending state. *Id.* at 52.

The receiving state, however, determines the manner and degree of supervision. The rules of the compact provide that "[a] receiving state shall supervise an offender transferred under the interstate compact in a manner determined by the receiving state and consistent with the supervision of other similar offenders sentenced in the receiving state." *Id.* at 38.

Under the logic of the decision below, these contacts may be enough for longarm personal jurisdiction against state officials who approve transfers of parolees who then harm citizens of the receiving state. In fact, the predecessor of this compact, known as the Uniform Act for Out-of-State Parolee Supervision, has given rise to longarm lawsuits by plaintiffs harmed by transferred offenders against foreign-state officials who approved the transfer. *Cf. Hansen v. Scott*, 645 N.W.2d 223, 236 (N.D. 2002) (accepting personal jurisdiction over Texas officials in a wrongful death and survivorship lawsuit where a parolee killed two people because "the Texas defendants unequivocally

directed activity regarding [the parolee] to North Dakota"); *Hodgson v. Mississippi Dep't of Corrections*, 963 F. Supp. 776, 781-82, 795-96 (E.D. Wis. 1997) (rejecting personal jurisdiction over Mississippi officials in a lawsuit brought by a Wisconsin citizen for the wrongful death of his daughter who was murdered in Wisconsin by a parolee from Mississippi).

**Interstate Compact on the Placement of Children**

The Interstate Compact on the Placement of Children establishes procedures and assigns responsibilities for placing children in foster care or adoptive custody across state lines. American Pub. Human Servs. Ass'n, *Guide to the Interstate Compact on the Placement of Children* 3 (2002). All fifty states, the District of Columbia, and the U.S. Virgin Islands have joined this compact. *Id.*

Picture a situation where an official places a child with a family in another state and that family turns out to be abusive. If the child accuses the official of an improper background check of the family and then sues the official, then under the decision below the official would likely be subject to personal jurisdiction in the state of the foster residence. *Cf. Nicini v. Morra*, 212 F.3d 798, 808 (3rd Cir. 2000) (holding that "when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties," which, when not performed, "can give rise . . . to liability under section 1983"); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987)

(acknowledging that a foster child may bring a Section 1983 action against government officials for injuries received while in foster care where "the proof shows that the state officials were deliberately indifferent to the welfare of the child" in the course of foster care placement).

**Interstate Compact on Adoption and Medical Assistance**

To encourage the adoption of children with special needs, Congress has enacted, and states administer, a program that provides medical and other types of adoption assistance. *See* Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 673. The Interstate Compact on Adoption and Medical Assistance, adopted by 49 states and the District of Columbia, provides uniform administrative procedures when a child with special needs is adopted by a family in another state, or when the adopting family later moves to another state. Ass'n of Adm'rs of the Interstate Compact on Adoption and Medical Assistance, *What is ICAMA?*, http://aaicama.org/cms/index.php/icamaaaicama/the-icama (last visited Oct. 7, 2008).

The compact is designed to eliminate geographic barriers that may impede available medical assistance and post-adoption services in such cases. *Id.* Under the compact, the obligation to provide adoption assistance remains where the child originates. *See* Interstate Compact on Adoption and Medical Assistance, Art. IV. Therefore, state officials have a continuing obligation as the child moves from one party state to another. The originating state also has a continuing obligation to

provide Medicaid benefits if a child moves to another party state that does not provide benefits specified by the adoption assistance agreement. *Id.* at Art. V. This obligation continues as the child relocates to other party states. *Id.* By 2010, approximately 600,000 children will be receiving Title IV-E adoption assistance, and this compact will apply to any that move to another party state. Elizabeth Oppenheim, *Why is a Compact Needed for Adoption and Medical Assistance?*, http://aaicama.org/cms/index.php/icamaaaicama/the-icama/why-a-compact (last visited Oct. 8, 2008).

Under the decision below, any such adopted children (or their guardians) may use the interstate contacts occasioned by the compact as a foothold for personal jurisdiction over foreign state officials in the courts of the destination state if assistance payments are not conducted properly.

### C. Business regulation yields longarm lawsuits against state officials

Issues related to longarm personal jurisdiction over state officials crop up in the context of state consumer protection enforcement as well. *See, e.g., Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008) (suit in Texas against Florida and California officials; personal jurisdiction rejected); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), *cert. denied*, ---S.Ct.--- (2008) (suit in Texas against Arizona officials; personal jurisdiction rejected).

A particularly noteworthy business regulation context relates to enforcement of cooperative multi-

jurisdictional settlements, such as the National Tobacco Master Settlement Agreement ("MSA"). In *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 166 (2d Cir. 2005), *cert. denied*, 127 S.Ct. 379 (2006), the court approved the exercise of personal jurisdiction over 30 foreign-state attorneys general based on MSA negotiations that occurred in New York. The court concluded that the MSA was a mere "ordinary commercial contract" and largely ignored palpable state sovereignty issues—including consequent state-by-state regulation of cigarette manufacturers—that underlay that settlement. *Id.* at 167.

Beyond the MSA, multi-state, multi-defendant regulatory enforcement settlements are common. Attorneys General and other state officials routinely enter into regulatory compliance agreements with businesses located in other states, including in recent years such multi-state businesses as State Farm, Moneygram, AON Corporation, UNUM Life Insurance Company of America, and Zurich Holding Company of America, Inc. These agreements often function as alternative forms of ongoing regulation, with implications not only for the signatories but also (as with the MSA) for new market entrants. Such agreements may well be reached as a result of multiple contacts between state regulators and the target company's own state. The reasoning of the decision below—and of the Second Circuit in *Grand River*—would enable regulated companies to file actions for breach (including declaratory claims relating to allegations of their own breach) against state officials in distant courts. Consequently, related issues of personal jurisdiction are of

significant importance in the business regulation context as well.

* * * *

As demonstrated, state officials on a daily basis engage in a wide variety—and seemingly infinite number—of official, regulatory acts that at some level are directed at other states. Under the reasoning of the decision below, each such act that causes injury in another state is sufficient to confer longarm personal jurisdiction in the courts of that state. Whether that is the proper way to analyze longarm jurisdiction over state officials for carrying out sovereign acts is an issue with far-reaching implications that demands attention from the Court.

## II. Lower Courts and State Officials Need Guidance Concerning the Relevance of State Sovereignty to Personal Jurisdiction

It is axiomatic that haling a state official into an out-of-state forum to defend official actions in his home state implicates fundamental principles of federalism and state sovereignty. Yet these principles are neither routinely nor consistently applied by courts charged with determining whether personal jurisdiction exists over an out-of-state official. While sovereignty and federalism considerations have factored heavily in some lower court decisions, *see, e.g., Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 488 (5th Cir. 2008), *cert. denied*, ---S.Ct.--- (2008), other courts—including the First Circuit in the decision below—have chosen not to consider these principles at all. *Hannon v. Beard*, 524 F.3d 275 (1st Cir. 2008); *see also Grand River*

*Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005).

As this Court has long held, "the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government[.]'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). However, inconsistent application of federalism and sovereignty principles by lower courts indicates judicial confusion as to how exactly the "context of our federal system" factors into the jurisdictional equation. Further, state officials would benefit from guidance putting them on notice as to when their official acts may legitimately subject them to personal jurisdiction in out-of-state forums.

### A. Decisions of the First and Fifth Circuits are irreconcilable, and decisions from other courts further demonstrate lack of uniform understanding

1. Inter-circuit confusion regarding the relevance of state sovereignty to personal jurisdiction is strikingly illustrated by comparing the decision below, where sovereignty and federalism principles played no role, to the plainly irreconcilable decision in *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008).

In *Wercinski*, a Texas-based company sought relief in a Texas federal court from attempts by the Commissioner of the Arizona Department of Real Estate to exercise regulatory authority over the

company's timeshare sales business, which had allegedly violated Arizona law by selling timeshares in Arizona without a license. *Wercinski*, 513 F.3d at 480. The Fifth Circuit held that exercising personal jurisdiction over the Arizona official in Texas would violate due process. *Id.* at 483. Of significant moment, the court considered sovereignty and federalism interests when analyzing whether asserting personal jurisdiction over the defendant would comport with the "reasonableness" requirement of the personal jurisdiction due process inquiry. *See id.* at 488 ("the shared interest of the several states is the most significant reasonableness consideration") (internal quotation omitted).

Indeed, recognizing that "[f]ederalism and state sovereignty are an essential part of the constraints that due process imposes upon personal jurisdiction," *id.*, the Fifth Circuit looked to this Court's opinion in *World-Wide Volkswagen* for the purpose served by those "constraints." *Id.* As this Court stated, federalism and state sovereignty do more than "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum;" they also "ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. With those purposes in mind, the Fifth Circuit held that asserting personal jurisdiction over an Arizona official in a Texas court "would create an avenue for challenging the validity of one state's laws in courts located in another state," a practice that would "greatly diminish the independence of the states." *Wercinski*, 513 F.3d at 488. *See also Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386 (5th Cir. 2008)

(relying on *Wercinski* and holding that the district court lacked personal jurisdiction over regulators from Florida and California).

In the decision below, by contrast, the court did not measure "reasonableness" by looking to the impact on sovereign independence, but instead merely weighed the states' relative interests in the specific social policy furthered by this particular case—*i.e.*, that transfers pursuant to the Interstate Corrections Compact should not be effected for illegal or retaliatory purposes. *Hannon*, 524 F.3d at 285. The First Circuit attempted to distinguish *Wercinski* as a challenge to a state statute rather than a state official's action. *Id.* at 281. But it offered no explanation why that distinction meant giving zero weight to sovereignty and federalism interests when considering whether the exercise of personal jurisdiction over an official of another state is "reasonable." The holding below is disharmonious with *Wercinski*.

2. Decisions from other courts further illustrate the inconsistent relevance of state sovereignty and federalism to personal jurisdiction analysis.

In *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005)—the lawsuit against state attorneys general challenging the MSA—the Second Circuit dismissed the notion that state sovereignty might bar the exercise of personal jurisdiction. It acknowledged that "New York would not ordinarily be the proper forum to challenge another state's legislative and executive actions," but nonetheless justified personal jurisdiction on the assumption that "[i]t is a rare event for the

representatives of various sovereign states to assemble purposefully in [one state] to attempt to jointly settle related lawsuits and to agree to then pass individual state statutes." *Grand River*, 425 F.3d at 167. The court did not explain how the relative rarity of such forum contacts made personal jurisdiction *more* reasonable rather than less. This enigmatic rationale amply demonstrates the need for clarity as to the significance of sovereignty to personal jurisdiction analysis.

The Sixth Circuit, on the other hand, takes a somewhat more systematic approach to the analysis of reasonableness and, by extension, sovereignty and federalism principles. The Sixth Circuit only considers the reasonableness of exercising personal jurisdiction when there is uncertainty as to whether the defendants purposefully availed themselves of the laws of the forum state or whether the claim arose out of the defendants' forum-related contacts. *See First Nat'l Bank v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1992) (holding that when these two elements are met, "an inference arises" that the reasonableness element is also satisfied); *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177 (6th Cir. 1992) (applying this rule in the context of a lawsuit against government officials and finding that those officials were not subject to personal jurisdiction in an out-of-state forum). Thus, when the court is satisfied that minimum contacts have been established, it sees no need to evaluate the reasonableness of asserting jurisdiction over the defendant, including any evaluation of sovereignty or federalism principles.

The Ninth Circuit and Tenth Circuits, on the other hand, explicitly *do* consider state sovereignty as one of several factors that inform whether exercising longarm personal jurisdiction would be reasonable. In *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995), where a California district court properly exercised personal jurisdiction over a sheriff from Florida, the court addressed "the extent of conflict with the sovereignty of the defendant's state." *Id.* at 475. It acknowledged that the "interference with Florida's sovereignty . . . is potentially greater here than in the ordinary tort action because defendants were following collection remedies provided under Florida law," *id.*, but concluded that "Florida's sovereign interests are outweighed by California's interest . . . in protecting its citizens from the [alleged] wrongful acts of nonresident defendants," *id.*, at least in that case. *See also, e.g., PTI, Inc. v. Philip Morris, Inc.*, 100 F.Supp.2d 1179, 1190 (C.D. Cal. 2000); *Dial Up Services, Inc. v. State of Oregon*, No. 07-00423, 2007 WL 4200756, at *5 (D. Ariz. Nov. 27, 2007) (both expressly weighing the impact of personal jurisdiction on sovereignty interests at stake).

Likewise, in *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), the Tenth Circuit considered state sovereignty interests in holding that a New Mexico district court did not have personal jurisdiction over Virginia correction officials. The Court had already found insufficient minimum contacts, but still evaluated several other factors—including weighing the relative state interests of New Mexico and Virginia—in order to determine whether the assertion of personal jurisdiction over the Virginia defendants would be reasonable. *Trujillo*, 465 F.3d

at 1221-22 ("Even assuming sufficient minimum contacts existed, we would still need to decide whether the assertion of personal jurisdiction over the Virginia defendants comports with fair play and substantial justice.") (citation omitted).

* * * *

This Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could [it] and remain faithful to the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 293. Yet inconsistent lower court opinions inherently cast doubt upon the relevance of state sovereignty to the jurisdictional analysis. The Court's guidance is necessary to eliminate this confusion and restore the relevance of sovereignty and federalism to personal jurisdiction analysis.

### B. State officials, too, would benefit from the Court's guidance

Not only would lower courts benefit from the Court's guidance as to the proper role of state sovereignty and federalism principles, but state officials would also benefit by being better informed as to when their actions might legitimately subject them to personal jurisdiction in out-of-state forums. As discussed in Part I, *supra*, cooperative interstate activity is on the rise, resulting in the proliferation of multi-state settlements and interstate compacts, and routine interaction by state officials with individuals and businesses in other states.

In this environment, the risk of being subjected to personal jurisdiction in a distant forum—and the

accompanying burden that entails—could cause some state officials to shy away from cooperative interstate activity, such as using ICC channels to deal with prison security and overcrowding problems. Without knowing whether they may be subjected to personal jurisdiction in the recipient state, prison officials will not be able to weigh effectively the costs and benefits of prisoner transfers. Similar uncertainties arise for state officials enforcing multi-jurisdictional settlement agreements or consumer protection laws against interstate business activities. Rather than risk subjecting themselves to personal jurisdiction in a distant forum, state officials may curtail these kinds of actions that would otherwise benefit the citizens of their states.

It is one thing for states and their officials to make such calculations following a decision and comprehensive explanation of the matter from this Court. It is another thing entirely to do so—perhaps unnecessarily—based on uncertainty about the law. In short, States and their officials need the Court to step in and provide guidance concerning their susceptibility to longarm lawsuits so they will be able to predict with more confidence the consequences of engaging in interstate government activities.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 10, 2008

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## Table A

## Cases Documenting Longarm Actions Filed By Prisoners Against State Government Officials

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|---|---|
| 2008 | *Jones v. Rowley*, No. 08-3207-SAC, 2008 WL 4329984 (D. Kan. Sept. 16, 2008) (complaint filed Aug. 15, 2008) |
| 2007 | *Howell v. Winchester*, No. CIV-07-1443-M, 2008 WL 700954 (W.D. Okla. Mar. 13, 2008) (complaint filed Dec. 27, 2007) |
| 2006 | *Kinslow v. Pullara*, 538 F.3d 687 (7th Cir. 2008) (complaint filed Jul. 25, 2006)<br><br>*Bowcut v. Idaho State Bd. of Correction*, No. CV-06-208-S-BLW, 2007 WL 1674028 (D. Idaho Jun. 5, 2007) (complaint filed May 25, 2006)<br><br>*Kinslow v. Transcor America, LLC*, No. CIV A 06 C 4023, 2006 WL 3486866 (N.D. Ill. Dec. 1, 2006) (complaint filed Jul. 25, 2006)<br><br>*Grandinette v. Bush*, No. 06-2052, 2006 WL 1658009 (W.D. Ark. Jun. 14, 2006) (complaint filed May 5, 2006)<br><br>*Kim v. Veglas, et al.*, No. 1:06-cv-11096-RCL (D. Mass. filed Jun. 22, 2006) |

**Table A (cont'd)**

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|---|---|
| **2005** | *Smith v. Warden, New Hampshire State Prison*, No. Civ. 05-CV-374-JD, 2006 WL 1425063 (D.N.H. Apr. 25, 2006) (complaint filed Dec. 2, 2005)<br><br>*Jones v. Armstrong*, No. 3:05CV450(RNC), 2006 WL 860095 (D. Conn. Mar. 31, 2006) (complaint filed Mar. 11, 2005) |
| **2004** | *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006) (complaint filed Jun. 4, 2004) |
| **2003** | *Hannon v. Beard*, 524 F.3d 275 (1st Cir. 2008) (complaint filed Oct. 31, 2003)<br><br>*Rivera v. Phillips*, No. 7:07cv00154, 2007 WL 1029589 (W.D. Va. Mar. 30, 2007) (complaint filed Jul. 31, 2003)<br><br>*Murphy v. Bradley*, No. 303CV714(DJS), 2004 WL 202419 (D. Conn. Jan. 16, 2004) (complaint filed Apr. 21, 2003) |
| **2001** | *Sadler v. Rowland*, No. 3:01CV1786(CFD) (WIG), 2004 WL 2061127 (D. Conn. Sept. 13, 2004) (complaint filed Sept. 17, 2001)<br><br>*Forstner v. Daley*, No. 02-1954, 2003 WL 1827217 (7th Cir. Apr. 2, 2003) (complaint filed May 2001)<br><br>*Bertram v. Wall*, No. CA 01-422ML, 2002 WL 1889030 (D.R.I. Jul. 11, 2002) (complaint filed Sept. 10, 2001)<br><br>*Joslyn v. Armstrong*, No. 3:01CV198(CFD), 2001 WL 1464780 (D. Conn. May 16, 2001) (complaint filed Feb. 7, 2001) |

**Table A (cont'd)**

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|---|---|
| 2000 | *Ibrahim v. District of Columbia*, 357 F. Supp. 2d 187 (D.D.C. 2004) (complaint filed Aug. 31, 2000) |
| 1999 | *Ali v. District of Columbia*, 278 F.3d 1 (C.A.D.C. 2002) (complaint filed May 27, 1999)<br><br>*Lee v. Federal Bureau of Prisons*, No. 99-3293-JWL, 2001 WL 111226 (D. Kan. Jan. 29, 2001) (complaint filed Aug. 31, 1999)<br><br>*Tillmon v. Taylor*, No. CIV. A. 99-258-SLR, 2001 WL 640971 (D. Del. Feb. 1, 2001) (complaint filed Apr. 22, 1999) |
| 1994 | *Boyne v. Politis*, 92 F.3d 1191 (9th Cir. 1996) (complaint filed Feb. 24, 1994) |
| 1989 | *Aronhalt v. Jones*, No. 89-204-FR, 1989 WL 87970 (D. Or. Jul. 21, 1989) (complaint filed Feb. 28, 1989) |